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In the

United States Court of Appeals

For the Seventh Circuit

No. 12074

ELOISE ARMS FORSTER, as Assignee of STATE BANK AND TRUST COMPANY, Executor of the Estate of Elizabeth G. Arms, Deceased,
Plaintiff-Appellant.

vs.

E. J. SAUBER, Director of Internal Revenue, Chicago, Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
John P. Barnes,
Trial Judge.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT.

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BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLANT.

STATEMENT OF THE FACTS.

(A) Nature of the Controversy.

The question involved in this suit is whether or not two single premium joint and survivor annuities purchased by the decedent during her lifetime are taxable in her estate, she having died prior to her daughter, the secondary annuitant.

The matter was heard on the motion for summary judgment filed by the plaintiff herein and the cross motion for summary judgment filed by the defendant herein. Defendant's motion was granted and plaintiff's motion was denied.

(B) Statement of the Facts.

The facts upon which the Court rendered its decision were stipulated to by the parties. One of the annuities in question was purchased by Elizabeth G. Arms, the decedent, on December 13, 1948, from the Travelers Insurance Company of Hartford, Connecticut; the single premium for said policy amounted to the sum of $38,872.13 and was paid by the decedent. Said contract provided for the payment monthly of an annuity of $125 to decedent during her lifetime and that at her death the monthly payment was to continue to be paid to Eloise R. Forster, her daughter, for the balance of her lifetime and that at the death of the survivor of the two, all obligation of the company was to cease.

On April 28, 1949, a similar single premium annuity policy No. 01855534 was issued by the John Hancock Mutual Life Insurance Company to the deceased, with Eloise Arms Forster as surviving beneficiary; that the single premium for said policy amounted to $38,872.50 and was paid by Elizabeth G. Arms, and that the policy provided for the payment of a monthly annuity of $125.00 until the death of the survivor of the two.

The executor of the estate of decedent filed an estate tax return for the estate on January 22, 1953, and included in that return the two annuities that have been described and paid to the Director of Internal Revenue the sum shown to be due on said return.

Following the filing of this estate tax return, the executor filed a gift tax return for the deceased for the year 1948 and included therein, among other items, the interest of Eloise Arms Forster in the annuity purchased from the Travelers Insurance Company and paid the tax assessed by the Treasury Department, plus interest thereon on June 14, 1954.

The executor also filed a gift tax return for decedent for the year 1949, including in this return the interest of Eloise Arms Forster in the annuity contract purchased from the John Hancock Mutual Life Insurance Company, and paid the tax assessed on said return by the officials of the Treasury Department, together with interest thereon on June 14, 1954.

Thereafter, the officials of the Treasury Department assessed the Federal Estate Tax on the gross estate of the decedent and included in said gross estate the value at death of the annuity policy issued by the Travelers Insurance Company and the value at death of the annuity policy issued by the John Hancock Life Insurance Company. In computing the tax due, the Treasury officials allowed the plaintiff a credit for the gift taxes paid.

Following the payment of the gift tax and the federal estate tax, on September 15, 1954, the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed a claim for refund in connection with said estate tax, claiming, among other things, that the value of the two annuities heretofore described should not have been included in the gross estate for estate tax purposes. The Commissioner of Internal Revenue denied the claim.

In assessing the Federal Estate Tax, the net estate (for the basic tax) was found by the officials of the Treasury Department to amount to $113,502.74 and that the value at death of the annuities heretofore described, amounting to $35,935.82 for the annuity of the Travelers Insurance Company, and the sum of $35,876.00 for the annuity of the John Hancock Mutual Life Insurance Company, were included in said net estate (for the basic tax). That were the value of these annuities excluded from the net estate (for the basic tax), it would amount to $41,690.92.

The value of the net estate (for additional tax), which

included the value at death of the two annuities hereto described was found by the officials of the Treasury Department to amount to $153,502.74; that were the value of the two annuities to be excluded from the net estate (for additional tax), it would have a value of $81,690.92.

The officials of the Treasury Department found that the total gross taxes of said estate, less the credit for the state Inheritance Tax, amounted to $35,226.76; that the officials of the Treasury Department allowed to the executor of the estate credit for payment of Federal Gift Taxes on the two annuities amounting to $7,323.93, and that the executor actually paid the sum of $27,902.83 estate tax, plus $479.42 interest; that these payments were made as follows: the sum of $22,472.59 for the estate tax on January 22, 1953, and the sum of $5,430.24 for the additional tax on July 29, 1954, and $479.42 interest paid on August 3, 1954. (The preceding facts are all stipulated App. 14.)

SUMMARY OF ARGUMENT.

The Treasury officials have erroneously imposed a tax upon the decedent's estate for the value of the two annuities purchased by decedent during her lifetime.

The first statute taxing transfers made during life was Section 202 of the Revenue Act of 1916, which imposed a tax upon trusts made by a decedent intended to take effect in possession or enjoyment at or after his death. Similar provisions were continued in subsequent revenue acts. The Treasury Department took the position that a transfer under which a decedent retained for his life the possession of or enjoyment of or the right to the income from the property transferred, constituted a transfer taxable under this section of the law as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

In 1930, the Supreme Court in the case of *May* v. *Heiner*, 281 U. S. 238, repudiated this interpretation of the law and held that such a transfer was not made to take effect in possession and enjoyment at death. Thereafter, by joint resolution, in 1931 and by an amendment in 1932, Congress added a provision to the law which taxed such transfers. This was held to be not retroactive so that the law of *May* v. *Heiner* was still applicable to pre-1931 transfers.

This was the status of the law when two decisions were rendered on the same day by the Supreme Court in 1949, *Commissioner* v. *Church*, 335 U. S. 632 and *Spiegels Estate* v. *Commissioner*, 335 U. S. 701. In the *Church* case, the Court split with three judges dissenting. The case involved the taxability of a pre 1931 transfer, with a retained life interest. The majority of the Court overruled *May* v.

Heiner and held that it was not entitled to the "sanctuary of *stare decisis.*" The majority opinion concluded as follows: "We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession or enjoyment at the settlor's death and that the Commissioner therefore properly included the value of its corpus in the trust estate."

On the same day in the *Spiegel* case it was decided by a 6 to 3 decision that Spiegel had made a transfer during life which was taxable under the possession and enjoyment clause because of an almost indistinguishable possibility of revertor which arose by operation of law and not by the express terms of the transfer. In the *Church* case the government also had claimed the transfer taxable because of a remote possibility of revertor. However, in its opinion the Court did not pass on this aspect of the case, but decided that the transfer was taxable as a transfer taking effect in possession and enjoyment at death solely because of the reservation in life income.

Following these decisions, Congress passed the Technical Changes Act of 1949, which excused from taxation under Section 811 c(1)C the possession and enjoyment clause, all transfers made before October 8, 1949, which did not have a reversionary interest or the possibility of one created by the express terms of the instrument of transfer, worth more than 5% of the value of the property immediately before the death of decedent. It is the plaintiff's contention that this provision added to the law excused all transfers intended to take effect in possession and enjoyment at or after death lacking the 5% reversionary value from taxation and that plaintiff's transfers, lacking this reversionary value, are not taxable because of the *Church* case, which specifically holds that transfers with a retained life interest are transfers taking effect in possession and enjoyment at death.

The plaintiff further contends that annuities of the type in question here have always been regarded primarily as transfers taking effect in possession and enjoyment at or after death and that while they have the retained life income feature of the *May* transfer and the *Church* transfer, they differ from these transfers because unless the transferor dies before the secondary annuitant, no one but the insurance company gets anything.

In the instant case, Mrs. Forster can receive nothing or know that she will receive anything as long as her mother lives. It is her mother's death which brings her the annuity, which she would not otherwise get. Hence, these transfers take effect in possession or enjoyment for Mrs. Forster only at her mother's death. They have always been transfers taking effect in possession and enjoyment at death.

THE CONTESTED ISSUES.

I.

Have joint and survivor annuities similar to the annu ties purchased by decedent in this case always been tran fers intended to take effect in possession and enjoyme at or after death?

II.

Are such transfers taxable under Section 811(c)(1)(E of the Internal Revenue Code of 1939?

III.

If such transfers are taxable under Section 811(c)(1)(E of the Internal Revenue Code of 1939, are they saved fro taxation by Section 7(a)(2) and 7(b) of the Technic Changes Act of 1949?

PROPOSITIONS OF LAW AND SUPPORTING AUTHORITIES.

I.

The Taxing Statutes Applicable to the Transfers Under Consideration Were the Result of Many Years of Legislative and Judicial Effort and Can Only Be Intelligently Interpreted After a Study and Consideration of Prior Acts and the Decisions of the United States Courts Regarding Them.

May v. Heiner, 281 U. S. 238.

Commissioner v. Church, 335 U. S. 632.

Spiegels Estate v. Commissioner, 335 U. S. 701.

Reinecke v. *Northern Trust Co.*, 278 U. S. 339.

Hassett v. *Welch*, 303 U. S. 303.

Burnet v. *Northern Trust Co.*, 283 U. S. 782.

Morsman v. *Burnet*, 283 U. S. 783.

McCormick v. *Burnet*, 283 U. S. 784.

Helvering v. *Hallock* 309 U. S. 106.

Joint Resolution of March 3, 1931, 46 Stat. 1516-17.

Revenue Act of 1916, 39 Stat. 776, 777, 778, Sec. 202.

Revenue Act of 1918, 212 Stat. 278, Sec. 402(c).

Revenue Act of 1926, 44 Stat. 9, Sec. 302(c).

Revenue Act of 1939, Sec. 811(c)1(A)(B)(C).

Technical Changes Act, 1949, 63 Stat. 891, Sec. 7a, 7b.

II.

Joint and Survivor Annuities Similar to the Annuities in Question in This Case Are Transfers Intended to Take Effect in Possession and Enjoyment at Death.

Commissioner v. Clise, 122 F. 2d 281 (1941).

Commissioner v. Wilder, 118 F. 2d 281 5th Cir., (1941).

Commissioner v. Mearkel, 129 F. 2d 386 (3rd Cir., 1942).

Chemical Bank & Trust Co. v. *Commissioner*, 37 B. T. A. 535.

III.

Joint and Survivor Annuities Similar to the Annuities Under Consideration in This Case Are Not Such Transfers as Are Taxable Under Section 811(c)1(B) of the Internal Revenue Code of 1939, But Are Taxable Under Sec. 811(c)1(C) of Said Act.

Same authorities as under Point II.

IV.

The Annuity Contracts Here in Question Being Transfers Which Were Intended to Take Effect in Possession or Enjoyment at or After the Death of Mrs. Arms, the Primary Annuitant, Were Not Includible in Decedent's Gross Estate Under the Provisions of Sec. 7(a)2 and Sec. 7(b) of the Technical Changes Act of 1949, Inasmuch as There Was No Reversionary Interest Created by the Express Terms of the Policies.

Pruyn v. *Commissioner*, 184 Fed. 2d 971 (2nd Cir., 1950) (Decision of Tax Court 12 T. C. 754).

Higgs v. *Commissioner*, 184 Fed. 2d 427 (3rd Cir., 1950) (Decision of Tax Court 12 T. C. 280).

V.

If Joint and Survivor Annuities Were Taxable as Transfers With a Retained Life Interest Prior to Commissioner v. Church, 335 U. S. 632, and Not as Transfers Taking Effect in Possession and Enjoyment at or After Death, They Would Still Be Saved from Taxation by the Technical Changes Act of 1949.

Commissioner v. *Church*, 335 U. S. 632.

VI.

Internal Revenue Laws Ordinarily Should Be Construed Liberally in Favor of the Taxpayer and Strictly or Most Strongly Against the Government.

Hassett v. Welch, 303 U. S. at 314.
White v. Aranson, 302 U. S. at 20.
Reinicke v. Northern Trust Company, 278 U. S. 339.
47 C. J. 2d 173.

ARGUMENT.

I.

The Taxing Statutes Applicable to the Transfers Under Consideration Were the Result of Many Years of Legislative and Judicial Effort and Can Only Be Intelligently Interpreted After a Study and Consideration of Prior Acts and the Decisions of the United States Courts Regarding Them.

The question to be determined in this case involves the estate tax liability of two transfers made by the decedent during life. The first Federal statute involving such transfers was Section 202, Revenue Act of 1916, 39 Stat. 776, 777, 778, and read as follows: "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * * (b) to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *."

After the passage of this act, until the decision in *May* v. *Heiner*, 281 U. S. 238, trust transfers which were designed to distribute the corpus at the settlor's death and which reserved a life income to the settlor had always been treated by the Treasury Department as transfers "intended to take effect in possession or enjoyment at his death." The regulations had so provided and millions of dollars had been collected from taxpayers on this basis. (See majority opinion of Judge Black in *Commissioner of Internal Revenue* v. *Church*, 335 U. S. 632 at page 639.)

This interpretation of the law was rejected by the Supreme Court in the case of *May* v. *Heiner,* 281 U. S. 238 at 244, decided April 14, 1930. In a unanimous opinion written by Justice McReynolds the court held that a transfer made during life which retained a life estate in the transferor was not a transfer which took effect at death and was not taxable in the transferor's death under Section 402(c). At page 244 the Court says:

> "In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347, 348, 73 L. ed. 410, 414, 415, 66 A. L. R. 397, 49 Sup. Ct. Rep. 123, the estate tax prescribed by the Revenue Act of 1918, Sec. 402(c) and carried into the Act of 1921 (November 23), 42 Stat. at L. 278, Chap. 136, as Sec. 402(c) thereof was under consideration. This court said:
>
> " 'In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute. * * *
>
> " 'In the light of the general purpose of the statute and the language of Sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in Sec. 402(c), "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Sec. 401. That doubt must be resolved in favor of the taxpayer.' "

The law of *May* v. *Heiner* was followed March 2, 1931, in the following three cases in *per curiam* opinions: *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, 75 L. Ed. 1412; *Morsman* v. *Burnet*, 283 U. S. 783, 75 L. Ed. 1412, and *McCormick* v. *Burnet*, 283 U. S. 784, 75 L. Ed. 1413. The day following the three *per curiam* opinions, at the instigation of Ogden Mills, Secretary of the Treasury, both houses of Congress unanimously passed a requested resolution which the President signed that same day. (See Judge Black's opinion, page 639, in *Commissioner* v. *Church*.) On June 7, 1932, an act was passed which was substantially the same as the Congressional resolution passed on March 3, 1931. After the passage of these amendments Section 302(c) of the Revenue Act of 1926 read as follows:

> "(c) Transfers in contemplation of, or taking effect at death.
>
> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *."
>
> The italicized words are the additions made by the amendments of 1931 and 1932 to Sec. 302(c) of the Revenue Act of 1926, 44 Stat. 9.

Section 811(c)1(A)(B) and (C) in the Internal Revenue Code of 1939 contained the same provisions, except that they appeared in three sections instead of one.

No further change in the law occurred until the Technical Changes Act of 1949 added Section 811(c)2 to the act.

The passage of this act was preceded in 1949 by two decisions of the Supreme Court rendered on the same day, one in *Commissioner* v. *Church*, 335 U. S. 632, and the other in *Spiegels Estate* v. *Commissioner*, 335 U. S. 701. Both of these cases involved the tax liability of transfers made during life in which the transferor parted with all dominion or control of the transferred assets, except that there was a possibility of revertor in each case arising by operation of law.

The *Church* case involved an irrevocable trust instrument, executed in 1924 in New York, providing that the income from the trust should be paid to the settlor during life, that on his death the trust should be terminated and the corpus distributed to his issue then surviving; and that in the event he should have no lawful issue surviving, the corpus should be paid in equal shares to his brothers and sisters then surviving, any child or children of a deceased brother or sister to take the share which the parent would have been entitled to receive if living. However, the trust agreement made no provision for disposal of the trust assets if the settlor died without children and without any of his brothers or sisters, or their children surviving him. The applicable revenue acts required for estate tax purposes the inclusion in a decedent's gross estate of the value of all property the decedent in his lifetime has transferred by trust, to take effect in possession or enjoyment at or after his death (pages 633-4).

The Commissioner took the position that the corpus of the trust was to be included in the decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after his death because of the possibility of reverter. The Tax Court overruled the Commissioner and held that the mere possibility of reverter by operation of

law upon a failure of the trust, due to the death of all the remaindermen prior to the decedent's death, was not such a possibility as to justify the Commissioner's view, and that the transfer escaped taxation because it was a transfer with a retained life interest made before the congressional resolution of March 3, 1931 and the act of June 7, 1932, which placed a tax on such transfers, but had been held to be not retroactive in *Hasset* v. *Welch*, 303 U. S. 303. The Court of Appeals affirmed the decision of the Tax Court (page 634).

Without squarely deciding in this case the point upon which the decision of the Tax Court was rested, a majority of the Supreme Court in an opinion by Judge Black expressing the views of five of the judges, held that the trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession or enjoyment at the settlor's death and that the value of its corpus was property included in the estate (page 651). The majority opinion overruled *May* v. *Heiner* and stated that the decision in that case could not be granted the sanctuary of *stare decisis* (page 647).

On the same day, the Court also decided the case of *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701.

In this case a trust instrument, executed in Illinois, provided that during the settlor's life the trust income was to be paid to his three children; if any of the children died before the settlor, to the child's issue, if any, otherwise to the settlor's other children; and that upon his death the corpus was to be distributed in the same manner. However, no provision was made for distribution of the corpus and its accumulated income should the settlor survive all of his children and grandchildren.

A majority of the court, in an opinion by Black, J., expressing the views of five of the Justices, held that the

trust property was properly included in the decedent's gross estate under Section 811(c) of the Internal Revenue Code, which requires including in a decedent's gross estate the value at his death of all property transferred in his lifetime by a trust "intended to take effect in possession or enjoyment at or after his death." The holding of *Helvering* v. *Hallock*, 309 U. S. 106, 84 L. ed. 604, 60 S. Ct. 444, 125 A. L. R. 1368, that the value of trust properties is properly included in a settlor's gross estate where the trust agreement expressly provides that the corpus should revert to the settlor in the event he outlives the beneficiaries, was extended to cover a situation where the settlor's chance to get back his property depends on operation of law and not an express reservation in the trust instrument. The court also refused to disturb the holding of the court below that under Illinois law the corpus of the trust reverts to the settlor if he outlives the beneficiaries.

Very strong dissenting opinions in both cases were filed by Judge Frankfurter and Judge Burton. Judge Frankfurter strongly objected to the overruling of *May* v. *Heiner* (page 675), while Judge Burton particularly commented on the remoteness of the possibility of reverter. In his opinion in the *Spiegel* case, at page 727, he makes the following statement in discussing the remoteness of the possibility of reverter present:

> "The remoteness of it is obvious from the fact that, even at the time of the execution of the trust when the chances of its realization were at their highest point, the possible reverter to the settlor was conceivable only if all three of the children of the settlor were to die before he did and were to die without descendants of their own. Disregarding the possibility of descendants of his children, the record shows an actuarial computation of the likelihood that the settlor would survive all three of his children of only about 1½ chances out of 100. On the basis of such a chance of

realization, the computation gave a value of about $4,000 to a trust corpus of $1,000,000. To tax the settlor's estate more than $450,000, as is here proposed, because of the existence of this $4,000 worth of a possible reverter is not the kind of taxation that a Court can readily imagine that Congress meant to impose. A proportion of 1½ to 100 suggests the appropriate application here of the maxim of *de minimis non curat lex.*"

Following these decisions the Congress of the United States passed the Technical Changes Act on October 25, 1949, with the evident intention of ameliorating the holdings of the court and of clarifying the situation. This act added to the existing law sub-section (2) of Section 811(c). The law as amended was as follows:

Internal Revenue Code 1939

Sec. 811. *Gross Estate.*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

(c) (As amended by Sec. 7(a) of the Technical Changes Act of 1949. C. 720, 63 Stat. 891.) "Transfers in Contemplation of, or Taking Effect at Death.—

"(1) GENERAL RULE.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

"(A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; or

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end

before his death (i) the possession of or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

"(C) intended to take effect in possession or enjoyment at or after his death."

(The original act consisted of the foregoing sections. The Technical Changes Act added the following sections to the Act.)

"(2) TRANSFERS TAKING EFFECT AT DEATH—TRANSFERS.

PRIOR TO OCTOBER 8, 1949.—An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property. For the purposes of this paragraph, the term 'reversionary interest' includes a possibility that property transferred by the decedent (A) May return to him or his estate, or (B) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Commissioner with the approval of the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent,

such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. * * * (b) The amendment made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811(c) of the nIternal Revenue Code, as amended by subsection (a), shall (except as otherwise specifically provided in such section or in the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811(c)(1)(B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) a transfer made prior to March 4, 1931; or

(2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

No interest shall be allowed or paid on any overpayment resulting from the application of subsection (a) with respect to any payment made prior to the date of the enactment of this Act."

II.

Joint and Survivor Annuities Similar to the Annuities in Question in This Case Are Transfers Intended to Take Effect in Possession and Enjoyment at Death.

We do not se how it is possible for anyone to conclude that the annuities here under consideration are not transfers intended to take effect in possession or enjoyment at death. The secondary annuitant can receive nothing or know that she will receive anything as long as the primary annuitant lives. It is the primary annuitant's death which brings her the annuity which she would not otherwise receive. The transfer under consideration in *May* v. *Heiner*,

see 281 U. S. at page 242, was made by a written instrument dated October 1, 1917, by which Pauline May, wife of Barney May, "transferred, set over and assigned" to him and others, as trustees (with power to change the investments), certain described securities—bonds, notes, corporate stocks, and money—in trust, to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance "to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said trust, in whatever form or shape it may be, shall, after the expenses of the trust have been deducted or paid, be distributed equally among" her four children, their distributees, or appointees.

This is a much different type of transfer than a joint and survivor annuity because when the transfer is made, it is established that someone will get the corpus of the trust at the transferor's death.

The first decisions we have been able to find in any of the United States Courts of Appeal or the Supreme Court of the United States dealing with the taxability of joint and survivor annuities are three cases decided in 1941 and 1942. These cases are as follows:

Commissioner v. *Clise*, 122 F. 2d 998 (9th Cir. 1941).

Commissioner v. *Wilder*, 118 F. 2d 281 (5th Cir. 1941).

Commissioner v. *Mearkle*, 129 F. 2d 386 (3rd Cir. 1942).

Commissioner v. *Wilder*, the first one decided, held that joint and survivor annuities, similar to the ones involved here, were taxable as transfers, taking effect in possession or enjoyment at or after death.

Commissioner v. *Clise*, which was decided a short time later, arrived at the same conclusion. Judge Garrecht

wrote the well considered opinion. At the commencement of the opinion (at page 1000) the Court stated that one of the questions to be determined was whether the value at decedent's death of 16 joint and survivor annuity contracts was required to be included in the decedent's gross estate as transfers in contemplation of or intended to take effect in possession or enjoyment at or after the donor's death. At page 1003, under point 5 of the decision, the Court makes the following statement:

> "(5) It is argued, however, that upon her death nothing passed from the dead to the living, that the making of the annuity contracts constituted completed gifts to the second annuitants as of the dates thereof. But this assertion is to no purpose, for, so long as Mrs. Clise lived, it was impossible for the second annuitants to possess or enjoy the economic benefits of the transfer and until Mrs. Clise's death it was not an absolute certainty that any one of the second annuitants would survive her. The death of the first annuitant, then, was the generating event. *Tyler* v. *United States, supra.* The death of Mrs. Clise caused a shifting, or the completion of a shifting of an economic benefit of property, which is the subject of a death tax. *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 338, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388. We quote from *Klein* v. *United States*, 283 U. S. 231, 234, 51 S. Ct. 398, 399, 75 L. Ed. 996: 'It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.' "

The Court also mentions the fact that because of the reservation of a life income, the property has some of the aspects of a retained life interest. We do not deny this is true. We contend, however, that annuities of this type have other features which distinguish them from the trans-

fer considered in *May* v. *Heiner* which cause them to be transfers which take effect in possession and enjoyment at death. It is evident that the court took the same view, as it decided the question posed at the beginning of the opinion in the affirmative, and said in conclusion:

> "It is not coining a phrase to say that taxation is a practical matter, dealing with practical problems. The practical effect of the annuity contracts was to reserve to Mrs. Clise the enjoyment of the property transferred and to postpone the fruition of the economic benefits thereof to the second annuitants until her death. In the light of the *Hallock* case the transfers were 'too much akin to testamentary dispositions not to be subjected to the same excise.' As we read the statute and understand the law of the *Klein* and *Hallock* cases, the Commissioner's position here is well taken."

The significant feature of the decision is, however, the Court's comments regarding *Chemical Bank & Trust Company* v. *The Commissioner*, 37 B. T. A. 535 (1938), appeal dismissed without opinion January 3, 1939 (2d Cir.). This case involved the taxability of joint and survivor annuities which had been purchased prior to 1931 and therefore under the congressional resolution of March 3, 1931, they were not subject to taxation as transfers with a retained life interest as described in the resolution. The Board of Tax Appeals held that the contracts were not taxable because they were not transfers made to take effect in possession or enjoyment at or after death and that at the death of the decedent nothing passed from the dead to the living. At page 1003, of the *Clise* case, Judge Garrecht makes the following comment on the case:

> "This brings us to a consideration of *Chemical Bank & Trust Co., etc. et al.* v. *Commissioner*, 37 B. T. A. 535 (counsel for respondents and P-H 1941 Federal Tax Service, Par. 23,252 advise that the Cir-

cuit Court of Appeals for the Second Circuit dismissed the petition for review without opinion). In that case, the decedent during his lifetime purchased two irrevocable annuity contracts, payable to himself so long as he should live, and upon his death to his wife if she should survive him. Both contracts were purchased prior to March 3, 1931; the decedent died December 15, 1933, and his wife survived him. The Commissioner included in decedent's estate the value of the annuities payable to the wife, as of December 15, 1933, the date of the death o the first annuitant. The Board overruled the Commissioner, saying:

"• • • The decedent had no right to change the beneficiary and no control or interest in the contracts other than his right to receive the annuities during his life. This right ceased at his death. The interest which his wife, Mary L. Saxe, had was a right to receive the annuities after his death if she survived him. That right she obtained absolutely at the time the contracts were made. It was not a right over which the testator had any power of revocation or control during his lifetime and at his death nothing passed from the dead to the living. (Citing the *May*, *Northern Trust*, *Morsman* and *McCormick* cases, *supra*.)"

Although *Hassett* v. *Welch*, *supra*, had been decided approximately a month when the Board of Tax Appeals promulgated the above decision, and the writer of the Board's opinion was aware of it (cf. 37 B. T. A. 542), the Board did not treat the question of retroactive operation of the amendment to the Act in its discussion of this phase of the problem before it in the *Chemical Trust* case, *supra*.

We cannot approve the Board's reasoning in the *Chemical Bank & Trust* case; the Board's view of the situation confronting it there does not coincide with ours. Moreover, that case could have been decided upon the authority of *Hassett* v. *Welch*, *supra*."

In the case of *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281, the Court made a similar finding with regard to

joint and survivor annuities. At page 282, the Court quotes the statute involved as follows:

> "The pertinent part of the estate tax statute, 26 U. S. C. A. Internal Revenue Code Sec/ 811, reads: The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible * * * (c) to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer by trust or otherwise, under which he has retained for his life * * * (1) the possession or enjoyment of, or the right to the income from, the property * * *."

At page 283, the Court continues as follows:

> "Those instalments that are paid while he and his wife are alive fall back into the community. Those which are paid after the death of either are received wholly by the survivor, who thus gets the deceased spouse's half interest without administration. The arrangement suffices to transfer one-half the value of the investment remaining at the first death to the survivor. Though it involves no trust it is a transfer 'otherwise', and comes within the words of the statute. The case does not fall under the last part of the above quoted clause about retaining possession or income so plainly as it does under the broad language preceding. This plan of transferring money-values at death without administration does not evade estate taxes. The Commissioner's action was proper and the tax ought to be redetermined accordingly."

In *Mearkle* v. *the Commissioner*, 129 F. 2d 386, the Court accepted the decision of the *Clise* case and held that joint and survivor annuities or transfers made to take effect in possession or enjoyment at or after death. At page 387 the Court says:

> "(1) Even without the authority of these deci-

> sions in the other Circuits we should be constrained to reach the same result. However, the question was so thoroughly discussed to the opinion of the court in the *Clise* decision that it would smack of pedantry to repeat so soon thereafter, an analysis of the problems dealt with in that opinion."

The significant thing in connection with the decisions in these three cases is that they were all made before *May* v. *Heiner* had been overruled, and, while its decision was considered to be good law and was followed, we think that this conclusively shows that none of the three Courts involved thought that the decision in *May* v. *Heiner* applied to joint and survivor annuity contracts.

III.

Joint and Survivor Annuities Similar to the Annuities Under Consideration in This Case Are Not Such Transfers as Are Taxable Under Section 811(c)1(B) of the Internal Revenue Code of 1939, But Are Taxable Under Sec. 811(c)1(C) of Said Act.

After a consideration of the authorities cited under the preceding two points, we believe it is clear that joint and survivor annuities are not taxable under Sec. 811(c)(1)(B). As has been shown in the argument under point I, this provision in the Revenue Act originated in 1931 following the decision in *May* v. *Heiner* and was intended to tax transfers similar to the transfer under consideration in that suit. Joint and survivor annuities, while they do have a life income feature, still are a different type of transfer, and inasmuch as they took effect in possession or enjoyment at or after death, they were not affected by the new provisions, and remained taxable as transfers taking effect in possession or enjoyment at or after death, and

are therefore taxable under the possession and enjoyment section which was Sec. 811(c)(1)(C) in the 1939 Internal Revenue Code.

IV.

The Annuity Contracts Here in Question Being Transfers Which Were Intended to Take Effect in Possession or Enjoyment at or After the Death of Mrs. Arms, the Primary Annuitant, Were Not Includible in Decedent's Gross Estate Under the Provisions of Sec. 7(a)2 and Sec. 7(b) of the Technical Changes Act of 1949, Inasmuch as There Was No Reversionary Interest Created by the Express Terms of the Policies.

Under the provisions of Sec. 7(a)(2) and Sec. 7(b) of the Technical Changes Act of 1949, transfers made before October 8, 1949, in the estates of persons dying after February 10, 1949, intended to take effect in possession or enjoyment at or after death are not includible in the decedent's gross estate unless he has retained a reversionary interest in the property arising by the express terms of the instrument of transfer and not by operation of law and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property.

One of the first cases to be decided which interpreted the Technical Changes Act was *Pruyn's Estate* v. *Commissioner*, 184 Fed. 2d 971. The case was originally filed in the tax court. The question presented was whether the interest that passed to the surviving sister upon the death of Mary L. Pruyn in joint and survivor annuity contracts purchased by deceased and her sister Nelly K. Pruyn was subject to estate tax in her estate under Sec. 811(c) of the Internal Revenue Code of 1939, the annuities having been purchased prior to 1931.

The estate claimed that the annuities were transfers with a retained life interest made before 1931 and hence not taxable because of the decision in *May* v. *Heiner*. The government claimed that the transfers were taxable because they were transfers made to take effect in possession or enjoyment at or after death. After the suit was filed and while it was pending before the tax court, the Supreme Court rendered its decision in *Commissioner* v. *Church*, 335 U. S. 632. Following this the tax court rendered a decision in favor of the government, finding the annuities taxable because they were transfers made to take effect in possession and enjoyment at death. 12 T. C. at page 757. The estate appealed to the United States Court of Appeals for the second circuit. While the appeal was pending, the Technical Changes Act of 1949 was passed. The Court of Appeals subsequently affirmed the holding of the tax court that the transfer was a transfer which took effect in possession or enjoyment at or after death, but held that because of the provision regarding a reversionary interest in the act, the transfer was no longer taxable. At page 971 the court says:

> "In *Commissioner* v. *Estate of Church*, 335 U. S. 632, 69 S. Ct. 322, 93 L. Ed. 288, the Supreme Court overruled the decision in *May* v. *Heiner*, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826 and held that retention by the grantor of a trust of the income for life was alone sufficient to render the transfer taxable under Section 811 (c) as one intended to take effect in possession or enjoyment at or after death. Because of this decision, the Tax Court included in the *Estate of Mary L. Pruyn* the interest acquired by Nelly on decedent's death. But the impact of the decision of the Supreme Court in *Commissioner* v. *Estate of Church*, *supra*, with respect to persons dying after February 10, 1939, was changed through the subsequent amendment of Section 811(c) by Section 7 of the Technical Changes Act of 1949, c. 720, 63 Stat. 891. The pertinent provisions of the Technical Changes Act, Section 811(c)(2), are

set forth in the margin.[1] We see no basis for the contention that the decedent retained such a reversionary interest as the Technical Changes Act requires in order to render the transfer taxable."

The case is squarely in point with the plaintiff's claims in the instant case. The strange thing about this case is, however, that the government's contention was that the transfer was one which took effect in possession or enjoyment at or after death and was not a transfer with a retained life interest which would free it from taxation under *May* v. *Heiner*. This is exactly opposite to its contention in this case.

Another case decided at about the same time as the *Pruyn* case was *Higgs Estate* v. *Commissioner*, 184 Fed. 2d 427. In this case decedent had an option to choose between two annuity retirement plans executed by and paid for by his employer. Decedent chose that plan which gave him a lesser annuity for himself with a survivorship annuity for his wife. At page 428 the Court says:

> "Under the contract of January 1, 1931, the decedent would have reached his 'normal retirement date' on January 1, 1938. The contract was amended, however, on January 5, 1934, effective as of January 1, 1934, so that decedent became eligible to retire immediately. As already stated, he continued in his employment until January 1, 1935. On September 12, 1934, the decedent designated his wife as beneficiary and elected to receive a reduced annuity so that the annuity would be continued to her after his death, should she survive him."

The Tax Court held the annuity taxable under Section 811(c) of the Internal Revenue Code. On page 429-30 the Court said:

> "It is a fact of paramount significance to this litigation that subsequent to the decision of the Tax Court

herein, Section 811(c) of the Internal Revenue Code was materially amended, and such amendment, insofar as pertinent hereto, is applicable to this decedent's estate. Public Law 378, October 25, 1949, Section 7, c. 720, 53 Stat. 891, 894.[3] Accordingly, the Commissioner seeks to reach the result obtained by the Tax Court through the application of what is now Section 811(c)(1)(B) of the Code, that is, the reservation of a life interest in the property transferred. He concedes, and properly, that no reversionary interest is involved so as to bring this case within Section 811 (c)(1)(C), that is, a transfer intended to take effect at death, as that Section is extenuated by Section 811(c) (2)."

At page 431 the Court continued:

"The 1949 amendment, however, was the direct result[4] of the Supreme Court's holding in the *Church* case and its companion, *In re Estate of Spiegel* v. *Commissioner*, 1949, 335 U. S. 701, 69 S. Ct. 301, 337 93 L. Ed. 330, 310. The unmistakable language of the new Section 811(c)(2) decrees that transfers made prior to October 8, 1949,[5] intended to take effect in possession or enjoyment at or after the decedent's death shall not fall within Section 811(c)(1)(C) merely for that reason unless the decedent has retained a reversionary interest.[6]

Assuming that the decedent in the case *sub judice* made a transfer of property to his wife, and that it was one intended to take effect in enjoyment upon his death if she survived him, nevertheless the exercise of the option would not come within the express terms of Section 811(c)(2), the Commissioner conceding that no reversionary interest existed in the decedent. Accordingly, if the transfer is subject to the estate tax, on the Commissioner's contention it must be on the basis of Section 811(c)(1)(B), that is, a transfer under which the decedent had retained for his life the possession or enjoyment of, or the right to the income from, the property transferred. We do not believe that this is so."

The court thereupon reversed the Tax Court and held the transfers not taxable. This case is also squarely in point with the plaintiff's claims herein.

V.

If Joint and Survivor Annuities Were Taxable as Transfers With a Retained Life Interest Prior to Commissioner v. Church, 335 U. S. 632, and Not as Transfers Taking Effect in Possession and Enjoyment at or After Death, They Would Still Be Saved from Taxation by the Technical Changes Act of 1949.

The concluding sentence of Judge Black's majority opinion in *Commissioner* v. *Church*, 335 U. S. 632, on page 651 stated: "We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession and enjoyment at the settlor's death and that the Commissioner therefore properly included the value of its corpus in the estate."

The effect of this decision was to return transfers encompassed by Section 811(c)(1)(B) to their original state prior to *May* v. *Heiner* as transfers, taking effect in possession or enjoyment at or after death and to make unnecessary this section of the law.

With this pronouncement before it, Congress passed the Technical Changes Act of 1949.

We can see no valid reason why some of the transfers passing at death should be excused from taxation and others taxed after the Supreme Court has specifically held that they should all be taxed alike, and we don't think that Congress intended this result.

VI.

Internal Revenue Laws Ordinarily Should Be Construed Liberally in Favor of the Taxpayer and Strictly or Most Strongly Against the Government.

The above rule of law appears in 47 C. J. 2d at page 173. There are a great many authorities cited by the Corpus Juris in support of this rule of law. Three of the authorities given are *Hassett* v. *Welch*, 303 U. S. at 314, *White* v. *Aranson*, 302 U. S. 16 at 20, *Reinicke* v. *Northern Trust Company*, 278 U. S. 339. The holding in *Reinicke* v. *Northern Trust Company* on this point is quoted with approval by the Supreme Court in *May* v. *Heiner*, 281 U. S. 28.

If there is any doubt in the court's mind as to which section of 811(c) the instant transfers come under, we think that these authorities apply and we submit that the tax payer should be entitled to the benefit of the doubt.

Conclusion.

The judgment of the District Court should be reversed and an order of judgment entered finding that the two annuities under consideration are not subject to the Federal Estate Tax, and directing the District Court to re-compute the tax using the facts and figures contained in the stipulation of facts appearing at page 22 of the Index, and to enter a judgment in favor of the plaintiff for any overpayment of estate taxes made by plaintiff's assignor, the State Bank and Trust Company of Evanston, Executor of the Estate of Elizabeth F. Arms, deceased, together with interest from the date of payment of the tax.

Respectfully submitted,

JAMES D. PETERSON,
Attorney for Plaintiff-Appellant.

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1 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Eloise Arms Forster, As assignee of State Bank and Trust Company, Executor of the Estate of Elizabeth G. Arms, Deceased,
Plaintiff,
vs.
E. J. Sauber, Director of Internal Revenue, Chicago, Illinois,
Defendant.
} Civil No. 55 C 993

PREFIX TO RECORD ON APPEAL.

The above suit was started and complaint was filed on July 6, 1955. The answer was filed on September 30, 1955. On October 17, 1955, United States of America was dismissed as a defendant. On June 20, 1956, the parties met with Judge Barnes and an agreed order was entered providing for the filing of cross motions for summary judgment. Plaintiff's motion was filed July 27, 1956, and the defendant's cross motion was filed August 27, 1956. On December 17, 1956, leave was given to the parties to file a stipulation of facts. On January 28, 1957, the stipulation of facts was filed instanter. Oral argument was waived and the cause was taken by the court for decision on the stipulation of facts and the briefs filed by the parties. On March 27, 1957, a draft judgment order was entered overruling plaintiff's motion for summary judgment, granting judgment for the defendant, dismissing the action with prejudice and granting the defendant his costs. Plaintiff filed notice of appeal on May 21, 1957.

James D. Peterson,
Attorney for Eloise Arms Forster.

2 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of March, being the 4th day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Seven and of the Independence of the United States of America, the 181st Year.

Present:

Honorable John P. Barnes, Chief District Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Wednesday, March 27, 1957.

Court met pursuant to adjournment.

Present: Honorable John P. Barnes, Trial Judge.

3 UNITED STATES DISTRICT COURT.
• • (Caption—55-C-993) • •

COMPLAINT.

1. This action arises under the Internal Revenue Laws of the United States, more particularly Section 7422 and Section 6532 of the Internal Revenue Code (26 U. S. C. A., Sections 7422-6532) and under Sections 1340 and 1346 of the Revised Judicial Code (28 U. S. C. A., Sections 1340 and 1346).

2. Decedent, Elizabeth G. Arms, died testate on October 25, 1951, a resident of the City of Evanston, Cook County, Illinois, which is situated in the Northern District of Illinois, Eastern Division, and Letters Testamentary were issued to plaintiff's assignor, the State Bank and Trust Company, of Evanston, Illinois, a banking and trust company duly organized under the laws of the State of Illinois on November 2, 1951 by the Probate Court of Cook County, Illinois.

3. Plaintiff, Eloise Arms Forster, assignee of the State Bank and Trust Company, Executor of the estate of Elizabeth G. Arms, was the daughter of Elizabeth G. Arms and is the sole heir of said deceased and is also the sole legatee of the residuary estate of said Elizabeth G. Arms.

4. On January 7, 1949, the said deceased, Elizabeth G. Arms, and Eloise Arms Forster, purchased from the Travelers Insurance Company of Hartford, Connecticut, a single premium sequential annuity contract No. 2451982. The single premium for said policy amounted to the sum of $38,872.13 and was paid by Elizabeth G. Arms. A
4 copy of said annuity contract is hereto attached, made a part hereof and marked Exhibit A. Said contract provided for the payment monthly of an annuity of $125.00 to Elizabeth G. Arms during her lifetime. At her death

the annuity was to continue to be paid to Eloise Arm Forster for the balance of her lifetime. At the death of the survivor of the two, all obligation of the company was to cease.

5. On April 28, 1949, a similar single premium annuity policy No. 0185534 was issued by the John Hancock Mutual Life Insurance Company to the deceased, and her daughter Eloise Arms Forster as surviving beneficiary. A copy of said contract is hereto attached, made a part hereof and marked Exhibit B. The single premium for said policy amounted to $38,872.50 and was paid by Elizabeth G. Arms. The policy provided for the payment of a monthly annuity of $125.00 until the death of the survivor of the two.

6. The State Bank and Trust Company, as Executor of the Estate of Elizabeth G. Arms, included in its Federal Estate Tax Return, filed January 22, 1954, value at date of death as computed by the said Executor of the annuity contracts described in paragraphs 4 and 5 of this Complaint, computing the value, at date of death, of said contracts as $19,963.50 for the policy issued by the Travelers Insurance Company, and at $20,373.00 for the contract issued by the John Hancock Mutual Life Insurance Company.

7. The officials and agents of the Treasury Department advised the said Executor that said annuities constituted a gift to Eloise Arms Forster, daughter of deceased and surviving beneficiary of the annuity, and that the said Executor must file a gift tax return on said annuities for the deceased. In conformity with the demand of the Treasury Department, and of E. J. Sauber, Chicago District Director of Internal Revenue, said executor filed a gift tax return showing the gift of said annuity and paid the tax found due thereunder with interest.

8. The Treasury Department, its agents and officials, and E. J. Sauber, Chicago District Director of Internal

Revenue, erroneously insisted on also including the value of these contracts in decedent's estate for estate tax purposes. It is the claim of the Executor that the value of the annuities, having been taxed as a gift, should not have been included in the value of the estate for estate tax purposes.

9. The United States Treasury, its agents and officials, computed the value of the annuity contract of the Travelers Insurance Company at date of death as being $35,935.82. This value is erroneous and excessive and the true value of said annuity at date of death is $19,963.50. The said officials of the United States Treasury also valued the annuity contract of the John Hancock Mutual Life Insurance Company as having a worth of $35,876.00 at the death of decedent. Plaintiff contends that the true value of that annuity for estate tax purposes was only $20,373.00.

10. On March 7, 1941, the said Deceased, Elizabeth G. Arms, purchased from Massachusetts Mutual Life Insurance Company a life insurance policy No. 1439049 on her life. The premiums thereon were paid by the Deceased up to and including the premium due March 7, 1945.

11. On December 4, 1948, the Deceased, by assignment, gave the absolute ownership in said policy to her daughter, Eloise Arms Forster, who thereafter paid premiums for the years 1949, 1950 and 1951. A copy of said assignment is hereto attached, made a part hereof and marked Exhibit C.

12. In determining the Federal Estate Tax, the United States Treasury Department has erroneously included the proceeds of the said insurance policy on the life of the Deceased in the amount of $25,307.50 in the value of the Decedent's estate. Plaintiff contends that the proceeds of this policy should not be included in the value of decedent's estate; or, in the alternative, only 8/11 of the proceeds should be included, or the sum of $18,456.00.

13. Plaintiff claims that because of the wrongful inclusion of the value of said annuity contracts in the value of decedent's estate for estate tax purposes, or, in the alternative, because of the erroneous and excessive value placed on said annuity policies; and because of the inclusion of the proceeds of the life insurance policy of the Massachusetts Mutual Life Insurance Company, de-
6 scribed in Paragraph 10, the said estate of the decedent, Elizabeth G. Arms, was erroneously and wrongfully overtaxed by the Treasury Department, its agents and officials, and E. J. Sauber, District Director of Internal Revenue.

14. That between the 22nd day of January, 1953, and the 29th day of July, 1954, plaintiff paid to E. J. Sauber, District Director of Internal Revenue, of Chicago, Illinois, for the estate tax of the estate of Elizabeth G. Arms, sums totalling $29,902.83, which included the sums of money wrongfully assessed, as heretofore complained of.

15. On the 15th day of September, 1954, said bank and trust company, as the Executor of the estate of Elizabeth G. Arms, filed a claim for refund of said estate tax in the sum of $19,668.80, a copy of said claim being hereto attached, made a part hereof and marked Exhibit D.

16. The said claim for refund was denied by the Commissioner of Internal Revenue on the 29th day of April, 1955, by a letter, a copy of which is attached hereto, made a part hereof and marked Exhibit E.

17. That the State Bank and Trust Company, Executor of the estate of Elizabeth G. Arms, Deceased, on the 22nd day of September, 1954, filed its Final Account in the Probate Court of Cook County showing the payment of all debts of said estate and all taxes assessed against the same and distributing to Eloise Arms Forster, residuary legatee, all of the assets remaining in said estate, including the claim for tax refund heretofore described in paragraph

15, which the said Executor assigned to the plaintiff on September 22, 1954. A copy of said assignment is hereto attached, made a part hereof and marked Exhibit F.

18. By reason of the action of E. J. Sauber, District Director of Internal Revenue, an estate tax on the estate of Elizabeth G. Arms, Deceased, was illegally, erroneously and excessively collected from the executor of said estate, as heretofore set forth in the preceding paragraphs.

Wherefore, plaintiff, as assignee of the claim for tax refund filed by the Executor aforesaid, prays judgment
7 against the defendant E. J. Sauber, District Director of Internal Revenue, Chicago, Illinois, or the United States of America, for the sum of $19,963.50, with interest thereon, from the date said sum was paid.

James D. Peterson.

Attorney for Plaintiff:
James D. Peterson
135 South La Salle Street
Chicago 3, Illinois
Phone: State 2-1403

22 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-993) * *

ANSWER.

Defendants, United States of America and E. J. Sauber, Director of Internal Revenue, by their attorney, Robert Tieken, United States Attorney for the Northern District of Illinois, for answer to plaintiff's complaint, admit, deny and allege as follows:

1. Admit the allegations of paragraph 1.

2. Admit the allegations of paragraph 2.

23 3. Admit the allegations of paragraph 3, except defendants are without information sufficient to form a

belief as to the truth of the allegation that Eloise Arms Forster is the sole heir of Elizabeth G. Arms, deceased.

4. Deny the allegations of paragraph 4, except it is admitted that on or about December 13, 1948, the deceased Elizabeth G. Arms purchased from the Travelers Insurance Company of Hartford, Connecticut, a single premium annuity contract No. 2451982. Defendants further admit that the single premium of $38,872.13 for this policy was paid by Elizabeth G. Arms and said contract provided for an annuity of $1,500 payable in monthly installments of $125 to Elizabeth G. Arms during her lifetime. Defendants further admit that at the death of Elizabeth G. Arms the annuity was to continue to be paid to Eloise Arms Forster for the balance of her lifetime and at her death all obligation of the company was to cease.

5. Deny the allegations of paragraph 5. Further answering paragraph 5, defendants allege that at a date unknown to them the deceased bought a single premium annuity policy No. 0185534 from the John Hancock Mutual Life Insurance Company. The deceased, Elizabeth G. Arms, paid the single premium of $38,872 On information and belief, the terms of this policy were substantially the same as the terms of the Travelers Insurance Company policy No. 2451982 as alleged in paragraph 4 hereof.

6. Deny the allegations of paragraph 6, except it is admitted that the State Bank and Trust Company, as executor of the estate of Elizabeth G. Arms, filed an estate tax return for the estate of Elizabeth G. Arms on January 22, 1954, and included in that return said Travelers Insurance Company policy at a value of $19,963.50 and the John Hancock Mutual Life Insurance policy at a value of $20,373.

7. Deny the allegations of paragraph 7, except it is admitted that the executor of the estate of Elizabeth G. Arms filed a gift tax return and included in such return the an-

nuities described in paragraphs 4 and 5 of this answer. Defendants specifically deny that this gift tax return showed the true gift tax liability of the estate.

8. Deny the allegations of paragraph 8. Further answering paragraph 8 of the complaint, defendants allege that plaintiff, or her assignor, received a credit in the amount of $7,323.93 for gift taxes paid. At the time of the filing of said gift tax return plaintiff, or her assignor, well knew that the deceased's estate would be entitled to such a credit and that, therefore, plaintiff would not be harmed in any way by the gift tax payment.

9. Deny the allegations of paragraph 9, except it is admitted that the defendants, or their agents, computed the value of the annuity contracts as alleged. Further answering paragraph 9 of the complaint, the defendants allege that the values respectively of $35,935.82 for the Travelers Insurance Company policy and $35,876 for the John Hancock Mutual Life Insurance Company policy were also computed by the officials of the respective insurance companies as being the sums of money it would cost to purchase annuities for the life of Eloise Arms Forster which would give her the same income as the annuities alleged in paragraphs 4 and 5 hereof.

10. Admit the allegations of paragraph 10, except defendants are without information sufficient to form a belief as to the date on which the alleged policy was purchased and except to deny the allegation or implication that premiums were ever paid by anyone other than the deceased.

11. Deny the allegations of paragraph 11, except it is admitted that the deceased assigned the alleged policy to Eloise Arms Forster on or about December 4, 1948.

12. Deny the allegations of paragraph 12.

13. Deny the allegations of paragraph 13.

14. Deny the allegations of paragraph 14. Further answering paragraph 14 of the complaint, defendants allege

that between the dates of January 22, 1953, and July 29, 1954, plaintiff paid sums totaling $27,902.83 to said E. J. Sauber, District Director of Internal Revenue, in payment of the estate tax liability of the estate of Elizabeth G. Arms.

15. Admit the allegations of paragraph 15, except to deny any allegations of the purported Exhibit D not elsewhere specifically admitted in this answer.

16. Admit the allegations of paragraph 16.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17, except it is admitted that at a time unknown to them the State Bank and Trust Company assigned the alleged claim to plaintiff herein.

18. Deny the allegations of paragraph 18.

First Affirmative Defense.

19. The estate of Elizabeth G. Arms received a credit for gift taxes paid in the amount of $7,323.93. In the event the Court concludes that the various policies in controversy were not subject to estate tax this credit should be canceled and the amount thereof set off against any recovery of plaintiff.

20. If the Court should conclude that the various policies here in controversy should not be included in the estate of Elizabeth G. Arms for tax purposes, the gift tax liability of said estate should be recomputed using the true values of said policies and the additional gift tax liability should be set off against any recovery of plaintiff herein.

Second Affirmative Defense.

21. The Court has no jurisdiction of this action because the United States of America has not consented to be joined as a defendant in any action with any other party.

Wherefore, having fully answered, defendants pray for judgment in their favor, for dismissal of plaintiff's complaint, for costs and such other relief as may be just and proper.

R. Tieken,
United States Attorney.

28 State of Illinois } ss
County of Cook }

Walter H. Sheparde, being first duly sworn, on oath deposes and says that he is employed as Clerk to the United States Attorney for the Northern District of Illinois, Chicago, Illinois; that on the 30th day of September, 1955, he placed a copy of the foregoing Answer in a Government franked envelope addressed to James D. Peterson, Esq., 135 S. La Salle Street, Chicago, Illinois, counsel for the plaintiff named in said Answer, and deposited said envelope in the United States Mail Chute located in the United States Court House, Chicago, Illinois, on said date.

Walter H. Sheparde.

Subscribed and sworn to before me this 30th day of September, 1955.

Ruth I. Quinlan,
Notary Public.

(Seal)

29 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-993) * *

MOTION FOR SUMMARY JUDGMENT.

Now comes the plaintiff by James D. Peterson, her attorney, and moves the Court to enter a summary judgment in the above matter, finding that the value of the annuity policy purchased by the Deceased, Elizabeth G. Arms, from the Travelers Insurance Company, No. 2451982, and taxed by the defendant as part of her gross estate for estate tax purposes was erroneously included in said gross estate; and also finding that the value of the annuity policy purchased by the Deceased, Elizabeth G. Arms, from the John Hancock Mutual Insurance Company, No. 0185534, was erroneously included in said gross estate.

The plaintiff also moves the Court to enter an order finding the amount of taxes illegally collected from the estate of Elizabeth G. Arms as a result of the erroneous inclusion of the value of said annuities in the gross estate for estate tax purposes, giving credit to the defendant for the
30 amount allowed to the estate of deceased by reason of the gift taxes paid by said estate.

The plaintiff will present in support of the motion the complaint filed herein with attached exhibits and the defendant's answer and a brief with attached affidavit, as well as the statutes of the United States applicable thereto.

James D. Peterson,
Attorney for Plaintiff.

30-d IN THE UNITED STATES DISTRICT COURT.
• • (Caption—55-C-993) • •

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The defendant, by his attorney, the United States Attorney for the Northern District of Illinois, respectfully moves this Court to enter judgment in his favor on that part of plaintiff's claim for relief arising out of allegations contained in paragraphs 4, 5, 6, 7, 8, 9, and those allegations in the remaining paragraphs of the com-
30-e plaint relative to the annuity policies here in issue, on the grounds that as to this part of plaintiff's claim there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

As further ground in support of this motion defendant submits that there is no just reason for delay in the entry of a final judgment as to this part of plaintiff's claim for relief and respectfully moves this Court for an express determination to such effect and for an express direction for the entry of judgment as prayed herein pursuant to Rules 54(b) and 56(d) of the Federal Rules of Civil Procedure.

Respectfully submitted,

R. Tieken,
United States Attorney.
Donald S. Lowitz,
Assistant United States Attorney.

31 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—55-C-993) • •

STIPULATION OF FACTS.

This matter having come on to be heard on the motion for summary judgment filed by the plaintiff herein, and the cross motion for summary judgment filed by the defendant herein, It Is Hereby Stipulated and Agreed by and between the parties, through their respective attorneys, that the following facts are accepted by the parties as true facts and as not in controversy.

1. Decedent Elizabeth G. Arms died testate on October 25, 1951, a resident of the City of Evanston, Cook County, Illinois, which is situated in the Northern District of Illinois, Eastern Division, and Letters Testamentary were issued to plaintiff's assignor, the State Bank and Trust Company of Evanston, Illinois.

2. Plaintiff, Eloise Arms Forster, is the assignee of the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms; that she was the daughter of Elizabeth G. Arms and is the sole heir of said deceased and is also the sole legatee of the residuary estate of said Elizabeth G. Arms and is a proper plaintiff.

32 3. That on December 13, 1948, the Deceased, Elizabeth G. Arms purchased from the Travelers Insurance Company of Hartford, Connecticut, a single premium sequential annuity contract No. 2451982; that the single premium for said policy amounted to the sum of $38,872.13 and was paid by Elizabeth G. Arms; that said contract provided for the payment monthly of an annuity of $125.00 to Elizabeth G. Arms during her lifetime; that at her death the annuity was to continue to be paid to Eloise R. Forster for the balance of her lifetime, and that at the death

of the survivor of the two, all obligation of the Company was to cease.

4. On April 28, 1949, a similar single premium annuity policy No. 01855534 was issued by the John Hancock Mutual Life Insurance Company to the deceased, with Eloise Arms Forster as surviving beneficiary; that the single premium for said policy amounted to $38,872.50 and was paid by Elizabeth G. Arms, and that the policy provided for the payment of a monthly annuity of $125.00 until the death of the survivor of the two.

5. The State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed an estate tax return for the estate on January 22, 1953, and included in that return the two annuities that have been described at a valuation of $19,963.50; for the interest at death of the annuity issued by the Travelers Insurance Company and a valuation of $20,373.00 for the interest at death of the annuity issued by the John Hancock Mutual Life Insurance Company, and paid to the Director of Internal Revenue the sum of $22,472.59 as the estate tax due on said return.

6. Following the filing of this estate tax return on December 13, 1948, the Executor filed a gift tax return for the Deceased for the year 1948 and included therein, among other items, the interest of Eloise Arms Forster in the annuity purchased from the Travelers Insurance Company of Hartford, Connecticut, at a valuation of $20,353.50, and paid the tax assessed by the Treasury Department, plus interest thereon on June 14, 1954.

7. The Executor also filed a gift tax return for decedent for the year 1949, including in this return, among other items, the interest of Eloise Arms Forster in the annuity contract purchased from the John Hancock Mutual Life Insurance Company at a valuation of $20,353.60, and
33 paid the tax assessed on said return by the officials of the Treasury Department, together with interest thereon, on June 14, 1954.

8. Thereafter, the officials of the Treasury Department assessed the Federal Estate Tax on the gross estate of the decedent and included in said gross estate the value at death of the annuity policy issued by the Travelers Insurance Company as being $35,935.82, and the value at death of the annuity policy issued by the John Hancock Life Insurance Company as being $35,876.00. In computing the tax due, said Treasury officials allowed the plaintiff a credit in the amount of $7,323.93 for the gift taxes paid.

9. Following the payment of the gift tax and the federal estate tax, on September 15, 1954, the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed a claim for refund in connection with said estate tax, claiming, among other things, that the value of the two annuities heretofore described should not have been included in the gross estate for estate tax purposes. The Commissioner of Internal Revenue denied the claim.

10. It Is Further Stipulated and Agreed that the net estate (for the basic tax) was found by the officials of the Treasury Department to amount to $113,502.74 and that the value at death of the annuities heretofore described, amounting to $35,935.82 for the annuity of the Travelers Insurance Company, and the sum of $35,876.00 for the annuity of the John Hancock Mutual Life Insurance Company, were included in said net estate (for the basic tax). That were the value of these annuities excluded from the net estate (for the basic tax), it would amount to $41,690.92.

11. It Is Further Stipulated and Agreed that the value of the net estate (for additional tax), which included the value at death of the two annuities hereto described was found by the officials of the Treasury Department to amount to $153,502.74; that were the value of the two annuities to be excluded from the net estate (for additional tax), it would have a value of $81,690.92.

34 12. It Is Further Stipulated and Agreed that the officials of the Treasury Department found that the total gross taxes of said estate, less the credit for the state Inheritance Tax, amounted to $35,226.76; that the officials of the Treasury Department allowed to the Executor of the estate credit for payment of Federal Gift Taxes on the two annuities amounting to $7,323.93, and that the Executor actually paid the sum of $27,902.83 estate tax, plus $479.42 interest; that these payments were made as follows: the sum of $22,472.59 for the estate tax on January 22, 1953, and the sum of $5,430.24 for the additional tax on July 29, 1954, and $479.42 interest paid on August 3, 1954.

13. It Is Further Stipulated and Agreed that the plaintiff has withdrawn all claims arising from the inclusion of the proceeds of Life Insurance Policy #1439019 issued by the Massachusetts Mutual Life Insurance Company on the life of Elizabeth G. Arms, in decedent's gross estate for estate tax purposes, as set forth in paragraphs 10, 11 and 12 of the complaint.

14. It Is Further Stipulated and Agreed that the plaintiff accepts the valuations placed by the Treasury officials upon the two annuity policies for the estate tax as being correct in the event that the Court shall determine that the value of the two annuities was properly included by the Government in the gross estate of Elizabeth G. Arms for estate tax purposes.

Eloise Arms Forster, As assignee of State Bank and Trust Company, Executor of the Estate of Elizabeth G. Arms, Deceased,

By: James D. Peterson,

Attorney for Plaintiff,

E. J. Sauber, Director of Internal Revenue,

By: R. Tieken,

U. S. Attorney.

35 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-993) * *

MEMORANDUM.

Each of the parties to this cause has filed a motion for summary judgment which presents the question of whether two annuity policies, purchased by decedent Elizabeth G. Arms and providing for monthly payments to decedent during her life then to plaintiff Eloise Arms Forster for her life, were properly included in the gross estate of said decedent for estate tax purposes.

The court has considered said motions, the stipulation of facts submitted by the parties, and the briefs of counsel and concluded therefrom that the value of the annuities were includable in such gross estate as falling within the meaning of Section 111(c)(1)(B) Title 26 U. S. Code, which provides that the value of the gross estate of a decedent shall be determined by including the value at the time of death of all property "to the extent of any interest therein of which the decedent has any time made a transfer * * * by trust or otherwise * * * (b) under which he has retained for his life * * * the possession or enjoyment of, or the right to the income from, the property, * * *." The
36 court is further of the opinion that the transfer here involved is not affected by the amendment of Section 811(c) of the Internal Revenue Code by Section 7 of the Technical Changes Act of 1949 and does not require the exclusion of such annuities from said gross estate.

The court, accordingly, finds that defendant's motion for summary judgment on that part of plaintiff's claim relative to the annuity policies here involved should be granted and that plaintiff's motion for summary judgment should be denied.

Counsel for defendant may, on notice, within 10 days, present drafts of findings of fact, conclusions of law, and a judgment order giving effect to the conclusions above expressed.

John P. Barnes,
Judge.

March 6, 1957.

37 IN THE UNITED STATES DISTRICT COURT.
• • (Caption—55-C-993) • •

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER.

The above-entitled Civil Action came on before the undersigned Judge on cross-motions for summary judgment. Plaintiff's motion for summary judgment was filed on July 27, 1956, and defendant's motion was filed on August 27, 1956. A stipulation was entered into between the parties whereby the plaintiff conceded the valuation placed upon the two annuity policies here in question by the defendant, the issue before the Court thereby being narrowed to the question of whether the two annuity policies in question constituted part of the gross estate of decedent Elizabeth G. Arms under the applicable provisions of the Internal Revenue laws. A stipulation of facts was presented by the parties, and briefs in support of the parties' motions for summary judgment were submitted.

Findings of Fact.

The Court finds the following facts in accordance with the stipulation of facts presented by the parties:

1. Decedent Elizabeth G. Arms died testate on October 25, 1951, a resident of the City of Evanston, Cook

38 County, Illinois, which is situated in the Northern District of Illinois, Eastern Division, and Letters Testamentary were issued to plaintiff's assignor, the State Bank and Trust Company of Evanston, Illinois.

2. Plaintiff, Eloise Arms Forster, is the assignee of the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms; that she was the daughter of Elizabeth G. Arms and is the sole heir of said deceased and is also the sole legatee of the residuary estate of said Elizabeth G. Arms and is a proper plaintiff.

3. On December 13, 1948, the Deceased, Elizabeth G. Arms purchased from the Travelers Insurance Company of Hartford, Connecticut, a single premium sequential annuity contract No. 2451982; that the single premium for said policy amounted to the sum of $38,872.13 and was paid by Elizabeth G. Arms; that said contract provided for the payment monthly of an annuity of $125.00 to Elizabeth G. Arms during her lifetime; that at her death the annuity was to continue to be paid to Eloise R. Forster for the balance of her lifetime, and that at the death of the survivor of the two, all obligation of the Company was to cease.

4. On April 28, 1949, a similar single premium annuity policy No. 01855534 was issued by the John Hancock Mutual Life Insurance Company to the deceased, with Eloise Arms Forster as surviving beneficiary; that the single premium for said policy amounted to $38,872.50 and was paid by Elizabeth G. Arms, and that the policy provided for the payment of a monthly annuity of $125.00 until the death of the survivor of the two.

5. The State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed an estate tax return for the estate on January 22, 1953, and included in that return the two annuities that have been described at a valuation of $19,963.50; for the interest at death of the annuity

issued by the Travelers Insurance Company and a valuation of $20,373.00 for the interest at death of the annuity issued by the John Hancock Mutual Life Insurance Company, and paid to the Director of Internal Revenue the sum of $22,472.59 as the estate tax due on said return.

39 6. Following the filing of this estate tax return on December 13, 1948, the Executor filed a gift tax return for the Deceased for the year 1948 and included therein, among other items, the interest of Eloise Arms Forster in the annuity purchased from the Travelers Insurance Company of Hartford, Connecticut, at a valuation of $20,353.50, and paid the tax assessed by the Treasury Department, plus interest thereon on June 14, 1954.

7. The Executor also filed a gift tax return for decedent for the year 1949, including in this return, among other items, the interest of Eloise Arms Forster in the annuity contract purchased from the John Hancock Mutual Life Insurance Company at a valuation of $20,353.60, and paid the tax assessed on said return by the officials of the Treasury Department, together with interest thereon, on June 14, 1954.

8. Thereafter, the officials of the Treasury Department assessed the Federal Estate Tax on the gross estate of the decedent and included in said gross estate the value at death of the annuity policy issued by the Travelers Insurance Company as being $35,935.82, and the value at death of the annuity policy issued by the John Hancock Life Insurance Company as being $35,876.00. In computing the tax due, said Treasury officials allowed the plaintiff a credit in the amount of $7,323.93 for the gift taxes paid.

9. Following the payment of the gift tax and the federal estate tax, on September 15, 1954, the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed a claim for refund in connection with said estate tax, claiming, among other things, that the value of the two an-

nuities heretofore described should not have been included in the gross estate for estate tax purposes. The Commissioner of Internal Revenue denied the claim.

10. The plaintiff has withdrawn all claims arising from the inclusion of the proceeds of Life Insurance Policy #1439019 issued by the Massachusetts Mutual Life Insurance Company on the life of Elizabeth G. Arms, in decedent's gross estate for estate tax purposes, as set forth in paragraphs 10, 11 and 12 of the complaint.

11. The plaintiff has stipulated that the valuations placed by the Treasury officials upon the two other annuity policies for the estate tax are correct.

12. At the date of death of the decedent the value of the Travelers Insurance Company annuity was $35,935.82; and the value of the John Hancock Mutual Life Insurance Company annuity was $35,876.00.

13. The Travelers Insurance Company annuity and the John Hancock Mutual Life Insurance Company annuity were part of the decedent's gross estate for estate tax purposes, and the additional estate tax assessed by the defendant and paid by the plaintiff, was properly assessed and paid.

Conclusions of Law.

1. This Court has jurisdiction of this cause of action and of the parties to the action.

2. The value of the Travelers Insurance Company annuity at the date of death of the decedent was $35,935.82, and the value of the John Hancock Mutual Life Insurance Company annuity was $35,876.00, these values representing the replacement cost at the date of death.

3. The value of the annuity contracts in question constituted property in which the decedent had an interest and of which the decedent made a transfer under which

she retained for her life the possession and enjoyment and the right to income from such property.

4. The value of the annuity contracts here in question constituted part of the decedent's gross estate under Section 811(c) (1) (B) of the Internal Revenue Code of 1939, as amended.

5. The provisions of Section 7(b) of the Act of October 25, 1949, c. 720, 63 Stat. 891 (The Technical Changes 41 Act) are not applicable to the situation here involved and do not require the exclusion of the value of the annuities in question from the gross estate of the decedent.

6. Section 7(b) of the Technical Changes Act pertains to and limits only Section 811(c) (1) (C) of the Internal Revenue Code of 1939 and does not qualify or limit Section 811(c) (1) (B) of that Act.

7. The Commissioner of Internal Revenue correctly determined that the gross estate of the decedent included the replacement value of the two annuity contracts here in question at the time of the death of the decedent.

8. The defendant did not err in assessing and collecting the estate taxes claimed by the plaintiff in this suit.

9. Defendant's motion for summary judgment is hereby granted and judgment should be entered in favor of the defendant together with the costs of this action.

This 27th day of March, 1957.

John P. Barnes,
Judge.

42 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-993) * *

JUDGMENT ORDER.

Now, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's motion for summary judgment is overruled, that defendant's motion for summary judgment is granted, and that judgment be entered for the defendant dismissing this action with prejudice and granting defendant his costs.

This 27th day of March, 1957.

John P. Barnes,
Judge.

43 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Eloise Arms Forster, as assignee of State Bank and Trust Company, Executor of the Estate of Elizabeth G. Arms, Deceased, *Plaintiff*,	Civil No. 55 C 993.
vs.	
E. J. Sauber, Director of Internal Revenue, Chicago, Illinois, *Defendant.*	

NOTICE OF APPEAL.

(Filed May 2, 1957. Roy H. Johnson, Clerk.)

Notice is hereby given that Eloise Arms Forster, a assignee of State Bank and Trust Company, executor o the Estate of Elizabeth G. Arms, Deceased, plaintiff in th above suit, hereby appeals to the United States Court o

Appeals for the Seventh Circuit from the final judgment entered in this action on March 27, 1957, overruling plaintiff's motion for summary judgment, and granting defendant's motion for summary judgment, and in accordance therewith dismissing this action with prejudice and granting defendant his costs.

James D. Peterson,
Attorney for Appellant,
135 South LaSalle Street,
Chicago 3, Illinois.

44 Parties in Interest Are:

Eloise Arms Forster, as assignee of State Bank and Trust Company, Executor of the Estate of Elizabeth G. Arms, Deceased, Plaintiff,
19 East Islay Street
Santa Barbara, California,

Represented by James D. Peterson, Attorney,
135 South LaSalle Street, Chicago 3, Illinois,
State 2-1403,

E. J. Sauber, Director of Internal Revenue, Chicago, Illinois, Defendant,

Represented by Department of Justice, Washington, D. C., and R. Tieken, U. S. Attorney at Chicago, Illinois.

James D. Peterson,
Attorney for Appellant,
135 South LaSalle Street,
Chicago 3, Illinois.

45 United States of America, } ss.
Northern District of Illinois. }

* * (Caption—55-C-993) * *

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 21st day of May, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable R. Tieken, United States Attorney,
450 United States Court House,
Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 21st day of May, 1957.

Roy H. Johnson,
Clerk.

By Gizella Butcher,
Deputy Clerk.

(Seal)

48 United States of America, } ss.
Northern District of Illinois. }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled Eloise Arms Forster, as assignee of State Bank and Trust Company, Executor of the Estate of Elizabeth G. Arms, Deceased, Plaintiff, vs. E. J. Sauber, Director of Internal Revenue, Chicago, Illinois, Defendant, No. 55 C 993, as follows:

Complaint filed July 6, 1955.

Answer of Defendants filed September 30, 1955.

Motion of plaintiff for summary judgment filed July 27, 1956.

Stipulation of Facts filed January 28, 1957.

Memorandum of the Court filed March 6, 1957.

Findings of Fact, Conclusions of Law entered March 27, 1957.

Judgment order entered March 27, 1957.

Notice of Appeal filed May 21, 1957 (Clerk's certificate of mailing attached).

49 Stipulation re contents of record on appeal filed June 17, 1957.

Statement pursuant to Rule 12(d) of the Rules of the United States Court of Appeals for the Seventh Circuit, filed June 20, 1957.

filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 21st day of June, 1957.

Roy H. Johnson,

Clerk.

By Gizella Butcher,

(Seal) *Deputy Clerk.*

Office Supreme Court, U.S.
FILED
FEB 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 760

ELOISE ARMS FORSTER, AS ASSIGNEE OF STATE BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF ELIZABETH G. ARMS, DECEASED,

Plaintiff-Appellant,

vs.

E. J. SAUBER, DIRECTOR OF INTERNAL REVENUE, CHICAGO, ILLINOIS,

Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JAMES D. PETERSON,
135 S. La Salle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

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IN THE

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OCTOBER TERM, 1957.

No. .....

ELOISE ARMS FORSTER, AS ASSIGNEE OF STATE BANK AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF ELIZABETH G. ARMS, DECEASED,

Plaintiff-Appellant,

vs.

E. J. SAUBER, DIRECTOR OF INTERNAL REVENUE, CHICAGO, ILLINOIS,

Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the District Court holding that defendant's motion for summary judgment on plaintiff's claim that certain annuity policies were not subject to the Federal Estate Tax should be granted, and plaintiff's motion for summary judgment be denied.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Judgment order of the District Court is printed as Appendix A. The opinion of the Court of Appeals is reported at 249 F. 2d 379, and is printed as Appendix B hereto.

JURISDICTION.

The judgment of the Court of Appeals is dated November 4, 1957, and was entered on that date. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTION PRESENTED.

1. Are joint and survivor annuities similar to the annuities purchased by decedent in this case transfers taxable under Section 811 (c) (1) (B) or 811 (c) (1) (C) of the Internal Revenue Code of 1939, or are they taxable under both sections.

2. If these transfers are taxable under both sections of the law, or are taxable under Section 811 (c) (1) (B) alone, does Section 7 (a) (2) and 7 (b) of the Technical Changes Act of 1949 save them from taxation because the decedent has retained less than a 5% reversionary interest arising by the express provisions of the policies.

STATUTES INVOLVED.

Internal Revenue Code 1939.

> Sec. 811. *Gross Estate.*
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property • • •
>
> (c) (As amended by Sec. 7(a) of the Technical Changes Act of 1949. C. 720, 63 Stat. 891.) "Transfers in Contemplation of, or Taking Effect at Death.—
>
> "(1) GENERAL RULE.—To the extent of any interest

therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

"(A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; or

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession of or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

"(C) intended to take effect in possession or enjoyment at or after his death."

(The original act in the 1939 code consisted of the foregoing sections, Section 811 (c) (1) (B) being the section added March 4, 1931 and June 7, 1932, to counteract *May v. Heiner*. The Technical Changes Act of 1949 added the following sections to the Act.)

"(2) TRANSFERS TAKING EFFECT AT DEATH—TRANSFERS.

PRIOR TO OCTOBER 8, 1949.—An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property.

For the purposes of this paragraph, the term 'reversionary interest' includes a possibility that property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Commissioner with the approval of the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. * * * (b) The amendment made by subsection (a) shall be applicable with respect to estates of decedents dying after February 10, 1939. The provisions of section 811 (c) of the Internal Revenue Code, as amended by subsection (a), shall (except as otherwise specifically provided in such section or in the following sentence) apply to transfers made on, before, or after February 26, 1926. The provisions of section 811(c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) a transfer made prior to March 4, 1931; or

(2) a transfer made after March 3, 1931, and prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

No interest shall be allowed or paid on any overpayment resulting from the application of subsection (a) with respect to any payment made prior to the date of the enactment of this Act."

HISTORICAL BACKGROUND OF THE STATUTES INVOLVED.

The first statute taxing transfers made during life was Section 202 of the Revenue Act of 1916, which imposed a tax upon trusts made by a decedent intended to take effect in possession or enjoyment at or after his death. Similar provisions were continued in subsequent revenue acts. The Treasury Department took the position that a transfer under which a decedent retained for his life the possession of or enjoyment of or the right to the income from the property transferred, constituted a transfer taxable under this section of the law as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

In 1930, the Supreme Court in the case of *May* v. *Heiner*, 281 U. S. 238, repudiated this interpretation of the law and held that such a transfer was not made to take effect in possession and enjoyment at death. Thereafter, by joint resolution, in 1931 and by an amendment in 1932, Congress added a provision to the law which taxed such transfers. This was held to be not retroactive so that the law of *May* v. *Heiner* was still applicable to pre-1931 transfers.

This was the status of the law when two decisions were rendered on the same day by the Supreme Court in 1949, *Commissioner* v. *Church*, 335 U. S. 632 and *Spiegels Estate* v. *Commissioner*, 335 U. S. 701. In the *Church* case, the Court split with three judges dissenting. The case involved the taxability of a pre-1931 transfer, with a retained life interest. The majority of the Court overruled *May* v. *Heiner* and held that it was not entitled to the "sanctuary of *stare decisis*." The majority opinion concluded as follows: "We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession or enjoyment at the settlor's

death and that the Commissioner therefore properly included the value of its corpus in the trust estate."

On the same day in the *Spiegel* case it was decided by a 6 to 3 decision that Spiegel had made a transfer during life which was taxable under the possession and enjoyment clause because of an almost indistinguishable possibility of revertor which arose by operation of law and not by the express terms of the transfer. In the *Church* case the government also had claimed the transfer taxable because of a remote possibility of revertor. However, in its opinion the Court did not pass on this aspect of the case, but decided that the transfer was taxable as a transfer taking effect in possession and enjoyment at death solely because of the reservation in life income.

Following these decisions, Congress passed the Technical Changes Act of 1949, which excused from taxation under Section 811 c(1)C the possession and enjoyment clause, all transfers made before October 8, 1949, which did not have a reversionary interest or the possibility of one created by the express terms of the instrument of transfer, worth more than 5% of the value of the property immediately before the death of decedent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. The Statutes Involved Are of Great Public Importance and Should Be Interpreted by the Supreme Court.

Section 7 of the Technical Changes Act was passed as a direct result of the holdings of the Supreme Court in *Commissioner* v. *Church*, 335 U. S. 632 and *Spiegels Estate* v. *Commissioner*, 335 U. S. 701.

Following the decision of *May* v. *Heiner*, 281 U. S. 238, in 1931, which excluded transfers with a retained life interest from taxation as transfers taking effect in possession

or enjoyment at or after death, and the passage by Congress, March 4, 1931 and June 7, 1932 of the additional paragraph of the Revenue Act, which specifically taxed transfers with a retained life interest, the law was in a great state of confusion.

The new paragraph was held not retroactive in *Hasset* v. *Welch*, 303 U. S. 303 and hence it became necessary in the case of pre-1931 transfers to determine in applicable cases whether the transfer was a transfer with a retained life interest or whether it was a transfer which took effect in possession and enjoyment at or after death. This caused a great deal of confusion in the law and it is impossible to reconcile many of the decisions of the various courts with each other.

As a result of this confusion, the Supreme Court, in an apparent effort to clarify the situation and simplify the law, rendered its opinion in *Commissioner* v. *Church*, 335 U. S. 632, the concluding sentence of which stated:

> "We hold that this trust agreement, because it reserved a life income in the trust property, was intended to take effect in possession and enjoyment at the settlor's death and that the Commissioner therefore properly included the value of its corpus in the estate."

The effect of this decision was to return transfers encompassed by Section 811 (c) (1) (B) to their original state prior to *May* v. *Heiner*, 281 U. S. 238, as transfers taking effect in possession or enjoyment at or after death and to make unnecessary this section of the law.

Section 7 (b) of the Technical Changes Act of 1949 contains the following provisions:

> "The provisions of Section 811 (c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—
>
> (1) a transfer made prior to March 4, 1931; or
>
> (2) a transfer made after March 3, 1931, and

> prior to June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516.)"

This provision does not say that Section 811 (c) 1 (c) shall not apply to these transfers, and the result is that because of the decision in *Commissioner* v. *Church*, pre-1931 transfers which were non-taxable because they were transfers with a retained life interest, became taxable provided there was a sufficient retention of a revisionary interest. This was recognized by the Circuit Court of Appeals for the 7th Circuit in the case of *Costin* v. *Crise*, 235 F. 2d 162. In this case the transfer was made on October 20, 1923. On page 165, Judge Lindley in his opinion said:

> "We think it clear that it was the intent to tax, under Section 811 (c) (2), all transfers dated prior to October 8, 1949, where possession or enjoyment of ultimate beneficiaries could be had only by surviving the decedent and the latter expressly retained a reversionary interest worth more than 5% of the property conveyed. Inasmuch as the decedent retained the income for life, plus a power of disposition of principal worth more than this part, it follows that the decedent retained the substantial interest in the transferred property mentioned by Congress and that no relief was afforded by section 7 of the Technical Changes Act of 1949. *Morristown Trust Co.* v. *Manning*, D. C., 104 F. Supp. 621, affirmed 3 Cir., 200 F. 2d 194, certiorari denied 345 U. S. 939, 73 S. Ct. 829, 97 L. Ed. 1365; *Estate of Slade* v. *Commissioner*, 15 T. C. 752, reversed on other grounds, 2 Cir., 190 F. 2d 689; *Estate of Hill* v. *Commissioner*, 23 T. C. 588, affirmed 2 Cir., 229 F. 2d 237."

We agree with the holding of the Court and with the reasoning set forth, but we think the same reasoning applies to the instant case where the secondary annuitant can

receive nothing unless she survives her Mother, and there is no retention of a reversion.

Apparently, Judge Lindley feels that this reasoning does not apply to our case because it involved a transfer made after the acts of March 4, 1931 and June 7, 1932 and that because the law says: "The provision of Section 811 (c) (1) (B) of such code shall not, in the case of a decedent dying prior to January 1, 1950, apply to—

(1) A transfer made prior to March 4, 1931, etc. • • • that the inference is that Section 811 (c) (1) (B) shall apply to transfers made after March 4, 1931.

It seems to us that this completely destroys the purpose of the law. Under this construction all pre-1931 transfers with a retained life interest are now transfers that pass in possession or enjoyment at or after death and are taxable unless the required reversionary interest is lacking, but in transfers made after March 3, 1931, the old difference is still to apply between the two forms of transfer, and if a transfer can be said to have a retained life interest, as described in Section 811 (c) (1) (B) it is taxable whether there is any reversion or not.

Furthermore it will be noted that in the instant case the decedent died after January 1, 1950, so that if the court's construction in the instant case is accepted, then in the estates of people dying after January 1, 1950, all transfers coming under the "retained life interest" clause made before October 8, 1949, are taxable whether pre-1931 transfers or not and regardless of a reversionary interest.

It seems to us that this is a warped and unnatural interpretation of the new act; that it was the intention of Congress to place the transfers encompassed by the two sections of the law back on the same basis they had been prior to the decision in *May* v. *Heiner*, 281 U. S. 238, as transfers passing in possession or enjoyment at or after death, and to make their taxation depend upon whether

or not the required reversionary interest existed. The quoted sentence was evidently placed in the act to make it retroactive as well as prospective.

In the next few years many transfers made prior to October 8, 1949, will be questioned and an interpretation of the new law now by the Supreme Court will prevent much litigation. The Treasury Department and the Attorney General should welcome such an interpretation.

II. The Conflicts Between the Various Circuits Should Be Resolved by the Supreme Court.

One of the first decisions rendered on the new act was in *Higgs Estate* v. *Commissioner*, 184 F. 2d 427. The case was started in the Tax Court. The annuity in question arose under an employee pension contract, under which the employer had paid the premiums. In 1934, under an option granted thereunder, the deceased elected to receive a lesser annuity to gain for his wife a survivorship annuity. The government claimed that the annuity was taxable under Sec. 811 (c) without specifying whether it was a transfer under Sec. 811 (c) (1) (B) or Section 811 (c) (1) (C). The Tax Court held, 12 T. C. 281-2, the annuity taxable under this section of the statute. After the case reached the Court of Appeals, the Technical Changes Act was passed. The government conceded that there was no reversionary interest, but claimed that the transfer was still taxable because it was a transfer coming within the purview of Sec. 811 (c) (1) (B). The taxpayer claimed there had been no transfer of property and hence the annuity did not come under the act at all. The Tax Court split on the question of whether there had been a transfer of property with the majority deciding that there had been such a transfer.

The Court of Appeals for the 3rd Circuit held that there was no reason to determine whether there had been a

transfer or not, because if it decided that there had been a transfer, it would not be taxable under Section 811 (c) as amended in 1949.

Another case which arose at about the same time was *Estate of Pruyn* v. *Commissioner*, 184 F. 2d 971—2d Cir. The government claimed that joint and survivor annuities were taxable even though they had been purchased prior to 1931, because they were transfers coming under Sec. 811 (c) (1) (C). The estate claimed the transfers came under Sec. 811 (c) (1) (B) and hence escaped taxation under *May* v. *Heiner*. The case was originally started in the Tax Court 12 T. C. 754. At page 757 the Tax Court said:

> "The consequence is that decedent's arrangement with the insurance companies whereby the transfer of her funds resulted in a postponement of the benefit conferred upon her sister until after decedent's death constituted a transfer, intended to take effect at death, of her property of which she retained the enjoyment during her lifetime. *Commissioner* v. *Wilder* (C. C. A., 5th Cir.), 118 Fed. (2nd) 281; certiorari denied, 314 U. S. 634; *Commissioner* v. *Clise* (C. C. A., 9th Cir.), 122 Fed. (2nd) 998; certiorari denied, 315 U. S. 821; *Mearkle's Estate*, 45 B. T. A. 894; affd. (C. C. A., 3d Cir.), 129 Fed. (2d) 386; *Estate of William J. Higgs*, 12 T. C. 280."

While the case was awaiting decision before the tax court, the Supreme Court decided *Commissioner* v. *Church*. After this added decision the tax court said there could be no doubt about the matter. The estate appealed to the United States Court of Appeals for the second circuit. While the appeal was pending, the Technical Changes Act of 1949 was passed. The Court of Appeals subsequently affirmed the holding of the tax court that the transfer was a transfer which took effect in possession or enjoyment at or after death, but held that because of the provision regarding a reversionary interest in the act, the transfer was no longer taxable.

In the instant case the government claims that the authorities cited in the Tax Court's decision of the *Pruyn* case, hold that joint and survivor annuities are transfers with a retained life interest. At page 5 of its brief the government made the following statement:

> "The courts have uniformly held that the purchase of survivorship annuity contracts (where the purchaser is the initial life annuitant, as here) effects a transfer of property as to which the decedent 'has retained for his life • • • the • • • enjoyment of • • • the property' within the meaning of Section 811 (c) (1) (B). See *Commissioner* v. *Clise*, 122 F. 2nd 998 (C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. A. 3d); *Grant* v. *Smyth*, 123 F. Supp. 771 (N. D. Cal.), affirmed per curiam, 226 F. 2d 407 (C. A. 9th); *Pruyn's Estate* v. *Commissioner*, 184 F. 2d 971, 972 (C. A. 2d); see also, *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5th), certiorari denied, 314 U. S. 634."

A reading of the court's opinion in the instant case shows that the court agreed with this statement of the authorities.

As one of its authorities, the government cites *Grant* v. *Smyth*, 123 F. Supp. 771 (N. D. Cal.), affirmed per curiam, 226 F. 2d 407 (C. A. 9th). This was the first case in which the government claimed initially that joint and survivor annuities were transfers coming under Section 811 (c) (1) (B). The case originated in the Northern District of California, Southern Division. It was decided after the *Pruyn* case. The taxability of annuities such as the ones here involved was one of the questions passed on.

Plaintiff contended that this was a transfer "intended to take effect in possession or enjoyment at or after his death" and since the transfer was made prior to October 7, 1949, it was not includible in the gross estate. The court decided that the annuity was includible in the gross estate. At page 772 the court said:

> "Were this question presented to the Court for the first time with no prior authority the Court would be inclined to believe that there was considerable merit in plaintiff's contention that this was a transfer intended to take effect in possession or enjoyment after death and not a transfer wherein grantor retained for life any possession or enjoyment thereof or the right to the income therefrom. However, the Ninth Circuit has held, and this is binding on this Court, that such a transfer is includible in the gross estate."

The foot note shows that the case alluded to by the court was *Commissioner* v. *Clise*, 122 Fed. 2d 998 (9th Cir.).

The last case we can find on the subject comes from the same district as *Grant* v. *Smyth*. The title of the case is *M. Libbey* v. *United States* 147 Fed. Sup. 383. It was decided by the district judge. This case involved the taxability of annuities in the estate of an employee who had obtained an annuity for his widow by failing to exercise an option. On page 384 the court says:

> "If Libbey had purchased the ten-year annuity with his own funds, the purchase would have constituted a transfer intended to take effect in possession or enjoyment at death. *Commissioner of Internal Revenue* v. *Clise*, 9 Cir., 1941, 122 F. 2d 998; *Commissioner of Internal Revenue* v. *Wilder's Estate*, 5 Cir., 1941, 118 F. 2d 281; *Mearkle's Estate* v. *Commissioner*, 3 Cir., 1942, 129 F. 2d 386."

From a consideration of these various cases, it seems to us as though the law is in a hopeless state of confusion and that the Supreme Court should pass upon the controversy and first of all determine (1) Does the Technical Changes Act of 1949 excuse from taxation transfers without the required reversionary interest, made before October 8, 1949 and after March 3, 1931, which before the passage of the act were taxable if they were held to be transfers coming under either Sec. 811 (c) 1 (B) or Sec. 811 (c) 1

(C). (2) If the answer to this is "No, transfers coming under 811 (c) 1 (B) are still taxable", then the Supreme Court should determine whether or not joint and survivor annuities are transfers with a retained life interest coming under Sec. 811 (c) 1 (C), or transfers which take effect in possession or enjoyment at death, coming under Sec. 811 (c) (1) (B), or both.

CONCLUSION.

For the foregoing reasons, it is requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-993) * *

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER.

The above-entitled Civil Action came on before the undersigned Judge on cross-motions for summary judgment. Plaintiff's motion for summary judgment was filed on July 27, 1956, and defendant's motion was filed on August 27, 1956. A stipulation was entered into between the parties whereby the plaintiff conceded the valuation placed upon the two annuity policies here in question by the defendant, the issue before the Court thereby being narrowed to the question of whether the two annuity policies in question constituted part of the gross estate of decedent Elizabeth G. Arms under the applicable provisions of the Internal Revenue laws. A stipulation of facts was presented by the parties, and briefs in support of the parties' motions for summary judgment were submitted.

Findings of Fact.

The Court finds the following facts in accordance with the stipulation of facts presented by the parties:

1. Decedent Elizabeth G. Arms died testate on October 25, 1951, a resident of the City of Evanston, Cook County, Illinois, which is situated in the Northern District of Illinois, Eastern Division, and Letters Testamentary were issued to plaintiff's assignor, the State Bank and Trust Company of Evanston, Illinois.

2. Plaintiff, Eloise Arms Forster, is the assignee of the

State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms; that she was the daughter of Elizabeth G. Arms and is the sole heir of said deceased and is also the sole legatee of the residuary estate of said Elizabeth G. Arms and is a proper plaintiff.

3. On December 13, 1948, the Deceased, Elizabeth G. Arms purchased from the Travelers Insurance Company of Hartford, Connecticut, a single premium sequential annuity contract No. 2451982; that the single premium for said policy amounted to the sum of $38,872.13 and was paid by Elizabeth G. Arms; that said contract provided for the payment monthly of an annuity of $125.00 to Elizabeth G. Arms during her lifetime; that at her death the annuity was to continue to be paid to Eloise R. Forster for the balance of her lifetime, and that at the death of the survivor of the two, all obligation of the Company was to cease.

4. On April 28, 1949, a similar single premium annuity policy No. 01855534 was issued by the John Hancock Mutual Life Insurance Company to the deceased, with Eloise Arms Forster as surviving beneficiary; that the single premium for said policy amounted to $38,872.50 and was paid by Elizabeth G. Arms, and that the policy provided for the payment of a monthly annuity of $125.00 until the death of the survivor of the two.

5. The State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed an estate tax return for the estate on January 22, 1953, and included in that return the two annuities that have been described at a valuation of $19,963.50; for the interest at death of the annuity issued by the Travelers Insurance Company and a valuation of $20,373.00 for the interest at death of the annuity issued by the John Hancock Mutual Life Insurance Company, and paid to the Director of Internal Revenue the sum of $22,472.59 as the estate tax due on said return.

6. Following the filing of this estate tax return on December 13, 1948, the Executor filed a gift tax return for the Deceased for the year 1948 and included therein, among other items, the interest of Eloise Arms Forster in the annuity purchased from the Travelers Insurance Company of Hartford, Connecticut, at a valuation of $20,353.50, and paid the tax assessed by the Treasury Department, plus interest thereon on June 14, 1954.

7. The Executor also filed a gift tax return for decedent for the year 1949, including in this return, among other items, the interest of Eloise Arms Forster in the annuity contract purchased from the John Hancock Mutual Life Insurance Company at a valuation of $20,353.60, and paid the tax assessed on said return by the officials of the Treasury Department, together with interest thereon, on June 14, 1954.

8. Thereafter, the officials of the Treasury Department assessed the Federal Estate Tax on the gross estate of the decedent and included in said gross estate the value at death of the annuity policy issued by the Travelers Insurance Company as being $35,935.82, and the value at death of the annuity policy issued by the John Hancock Life Insurance Company as being $35,876.00. In computing the tax due, said Treasury officials allowed the plaintiff a credit in the amount of $7,323.93 for the gift taxes paid.

9. Following the payment of the gift tax and the federal estate tax, on September 15, 1954, the State Bank and Trust Company, as Executor of the estate of Elizabeth G. Arms, filed a claim for refund in connection with said estate tax, claiming, among other things, that the value of the two annuities heretofore described should not have been included in the gross estate for estate tax purposes. The Commissioner of Internal Revenue denied the claim.

10. The plaintiff has withdrawn all claims arising from the inclusion of the proceeds of Life Insurance Policy

#1439019 issued by the Massachusetts Mutual Life Insurance Company on the life of Elizabeth G. Arms, in decedent's gross estate for estate tax purposes, as set forth in paragraphs 10, 11 and 12 of the complaint.

11. The plaintiff has stipulated that the valuations placed by the Treasury officials upon the two other annuity policies for the estate tax are correct.

12. At the date of death of the decedent the value of the Travelers Insurance Company annuity was $35,935.82, and the value of the John Hancock Mutual Life Insurance Company annuity was $35,876.00.

13. The Travelers Insurance Company annuity and the John Hancock Mutual Life Insurance Company annuity were part of the decedent's gross estate for estate tax purposes, and the additional estate tax assessed by the defendant and paid by the plaintiff, was properly assessed and paid.

Conclusions of Law.

1. This Court has jurisdiction of this cause of action and of the parties to the action.

2. The value of the Travelers Insurance Company annuity at the date of death of the decedent was $35,935.82, and the value of the John Hancock Mutual Life Insurance Company annuity was $35,876.00, these values representing the replacement cost at the date of death.

3. The value of the annuity contracts in question constituted property in which the decedent had an interest and of which the decedent made a transfer under which she retained for her life the possession and enjoyment and the right to income from such property.

4. The value of the annuity contracts here in question constituted part of the decedent's gross estate under Section 811(c) (1) (B) of the Internal Revenue Code of 1939, as amended.

5. The provisions of Section 7(b) of the Act of October 25, 1949, c. 720, 63 Stat. 891 (The Technical Changes Act) are not applicable to the situation here involved and do not require the exclusion of the value of the annuities in question from the gross estate of the decedent.

6. Section 7(b) of the Technical Changes Act pertains to and limits only Section 811(c) (1) (C) of the Internal Revenue Code of 1939 and does not qualify or limit Section 811(c) (1) (B) of that Act.

7. The Commissioner of Internal Revenue correctly determined that the gross estate of the decedent included the replacement value of the two annuity contracts here in question at the time of the death of the decedent.

8. The defendant did not err in assessing and collecting the estate taxes claimed by the plaintiff in this suit.

9. Defendant's motion for summary judgment is hereby granted and judgment should be entered in favor of the defendant together with the costs of this action.

This 27th day of March, 1957.

JOHN P. BARNES,
Judge

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—55-C-993) * *

JUDGMENT ORDER.

Now, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff's motion for summary judgment is overruled, that defendant's motion for summary judgment is granted, and that judgment be entered for the defendant dismissing this action with prejudice and granting defendant his costs.

This 27th day of March, 1957.

JOHN P. BARNES,
Judge.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12074. September Term and Session, 1957.

ELOISE ARMS FORSTER, as Assignee of STATE BANK AND TRUST COMPANY, Executor of the Estate of Elizabeth G. Arms, Deceased,
Plaintiff-Appellant,
vs.
E. J. SAUBER, Director of Internal Revenue, Chicago, Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 4, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* The only question raised in this appeal from a decision of the United States District Court is whether, under Section 811(c)1(B) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 Ed.), Sec. 811, the gross estate of the decedent for federal tax purposes includes the value, at the date of the decedent's death, of two survivorship annuity contracts, which she purchased during her lifetime.

The decedent, Mrs. Elizabeth Arms, in December, 1948, and April, 1949, purchased two annuities, one from the

Travelers' Insurance Company for a premium of $38,872.13, and one from John Hancock Mutual Life Insurance Company for a single premium of $38,872.50. Under each, the decedent was to receive an annuity during her lifetime and, upon her death, her daughter, plaintiff in this cause, Eloise Arms Forster, was to receive the annuity until the date of her death. The district court held that the value of each policy, which is not in controversy, should be included in the gross estate of the decedent for federal estate tax purposes, and entered judgment for defendant. Plaintiff has appealed, urging that the annuities should not be included as transfers retaining life estates, but that they should be included as transfers intended to take effect in possession or enjoyment at the death of the transferor.

Before discussing the issues, we should add that the executor made gift tax returns and paid a gift tax on each of the policies after Mrs. Arms died. The Commissioner, in determining deficiencies, allowed a credit upon the estate tax for the amount of gift taxes paid. The tax assessed was paid, whereupon this suit to recover was instituted.

Section 811(c)1 of the Internal Revenue Code of 1939 makes it necessary to include in a decedent's gross estate the value of all property of which the decedent has at any time made a transfer "(B) under which he has retained for his life * * * the possession of or enjoyment of or the right to the income from, the property" transferred, and (C) all such transfers "intended to take effect in possession or enjoyment at or after his death", and as we have said, our sole question is whether the Commissioner properly concluded and the trial court held that these annuities were governed by transfers defined under (B).

It seems to us crystal clear that the very terms of the statute require inclusion of the transfers, inasmuch as the grantor has retained the economic enjoyment of the contracts for life, since each annuity provided expressly

that the purchaser retained the income for as long as she lived, and that, upon her death, it would be paid to her daughter during the latter's lifetime. Agreeing with our conclusion is the opinion of the Ninth Circuit, in *Commissioner* v. *Clise*, 122 F. 2d 998, cert. den. 315 U. S. 821. There, the court said (pp. 1003, 1004): "Unquestionably, Mrs. Clise, the first annuitant, reserved to herself the enjoyment—the economic benefit, of these contracts during her lifetime. * * * it follows that the decedent had reserved a life estate in the proceeds of the contracts, which would leave the value of the respective contracts taxable to her, * * * '* * * of which [decedent] has at any time made a transfer, * * * under which he has retained for his life * * * the * * * enjoyment of * * * the property, * * *.' The word 'transfer', said the Supreme Court in *Chase Nat. Bank* v. *United States*, 278 U. S. 327, 337, * * *, 'must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.' * * * It is not coining a phrase to say that taxation is a practical matter, dealing with practical problems. The practical effect of the annuity contracts was to reserve to Mrs. Clise the enjoyment of the property transferred and to postpone the fruition of the economic benefits thereof to the second annuitants until her death." This case was followed by *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (CA-3), where the court adopted the reasoning of the Ninth Circuit, saying (p. 388): "We agree with that court that the practical effect of such annuity contracts is to reserve to the annuitant the enjoyment of the property transferred and to postpone the fruition of the economic benefits to the second annuitant until after the death of the first * * *" and by *Grant* v. *Smyth*, 123 F. Supp. 771. See also *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (CA-5), cert. den. 314

U. S. 634. From the statute and from these decisions, we see no escape from the conclusion that these contracts retained a life interest in the grantor and provided that upon her death the remainder should pass to a designated grantee and must, therefore, be included in the gross estate.

It is true that there seems to be some overlapping of the two classes of transfers mentioned in the statute, (B), including all transfers in which a definite interest is retained in the grantor, which expires upon her death, and (C) including transfers made in contemplation of death. This apparent overlapping is understandable when the history of Federal estate tax decisions is considered. When the Supreme Court held that certain transfers were not includable, Congress amended the statute, and, later, because of what it deemed an exigency, passed the Technical Changes Act. The statute to which we have referred is the presently controlling one. It seems to us immaterial that certain transfers may be found within the classification of both (B) and (C); the important feature of this case is that the facts bring it exactly and flatly within (B) rather than (C). So, as the Fifth Circuit decided in *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281, cert. den. 314 U. S. 634, it is immaterial whether the purchaser of a survivorship annuity contract effects also a transfer under (C) insofar as the application of Section 811(c)1 is concerned. The fact that the annuities were includable under paragraph (B) is sufficient to justify the Commissioner's and the trial court's decision.

Apparently, the tax payer contends that the transfers should be considered as taking effect, in possession and enjoyment after death and not includable in the gross estate unless the grantor, the decedent, reserved an interest in the remainder of the transferred property, the value of which exceeded 5% of the property immediately

before decedent's death. We think that it does not follow that these transfers should be so classified for the reason that they were transfers of property in which the decedent retained a life interest and nothing after that.

Plaintiff relies upon *Pruyn's Estate* v. *Commissioner*, 184 F. 2d 971 (CA-2). We think the citation is inapposite. In that case decedent purchased similar annuity contracts prior to 1931 and the transfer could not be included in the decedent's gross estate because Section 7 of the Technical Changes Act of 1949 specifically made Section 811(c)1(B) of the code inapplicable to transfers prior to 1931, whereas, in the present case, the transfers were made in 1948 and 1949. Plaintiff seems to find comfort also in *Higg's Estate* v. *Commissioner*, 184 F. 2d 427 (CA-3). However, in that case, the transferor, the decedent, had not purchased the annuity, but it had been bought by his employer who paid the premium. The only transfer the decedent made was that, by exercising an option to take a lesser annuity, he thereby provided an additional annuity for the remainderman. The court held that his acts did not amount to a transfer under (B), but rather were controlled by (C). If the decision is properly interpreted as applying to the instant case, we cannot agree with it.

The judgment is

AFFIRMED.

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No. 760

In the Supreme Court of the United States

OCTOBER TERM, 1957

ELOISE ARMS FORSTEL, AS ASSIGNEE OF STATE BANK AND TRUST COMPANY, EXECUTOR, PETITIONER

v.

E. J. SAUBER, DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 20–24) is reported at 249 F. 2d 379. The memorandum of the District Court (R. 18–19),[1] and its findings of fact and conclusions of law (Pet. 15–19; R. 19–23), are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 4, 1957 (Pet. 20). The petition for a writ of certiorari was filed February 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

[1] Record references herein are to the printed record appendix to the petitioner's brief in the court below.

QUESTION PRESENTED

Whether the values of two survivorship annuity contracts purchased by the decedent during her lifetime are includible in her gross estate under Section 811 (c) (1) (B) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Section 811 (c) of the Internal Revenue Code of 1939, as amended, provides:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) [As amended by Sec. 7 (a) of the Act of October 25, 1949, c. 720, 63 Stat. 891; Sec. 501 (b) (1) of the Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 207 (a) of the Technical Changes Act of 1953, c. 512, 67 Stat. 615] *Transfers in Contemplation of, or Taking Effect at, Death.*—
>
> (1) *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—
>
> (A) in contemplation of his death; or
>
> (B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which

does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death.

Subparagraph (B) shall not apply to a transfer made before March 4, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

(2) *Transfers taking effect at death—transfers prior to October 8, 1949.* An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property. For the purposes of this paragraph, the term "reversionary interest" includes a possibility that property transferred by the decedent (A) may return to him or his estate, or (B) may be subject to a power of

disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of th decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Commissioner with the approval of the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate.

(3) *Transfers taking effect at death—transfers after October 7, 1949.*—An interest in property transferred by the decedent after October 7, 1949, shall be included in his gross estate under paragraph (1) (C) of this subsection (whether or not the decedent retained any right or interest in the property transferred) if and only if—

(A) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent; or

(B) under alternative contingencies provided by the terms of the transfer, possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the earlier to occur of (i) the decedent's death or (ii) some other event; and

such other event did not in fact occur during the decedent's life.

Notwithstanding the foregoing sentence, an interest so transferred shall not be included in the decedent's gross estate under paragraph (1) (C) of this subsection if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a power of appointment (as defined in section 811 (f) (2)) which in fact was exercisable immediately prior to the decedent's death.

* * * * *

(26 U. S. C. 811.)

STATEMENT

The facts as stipulated were found by the District Court (Pet. 15–18; R. 14–17). The decedent, Mrs. Elizabeth Arms, died testate on October 25, 1951, a resident of Evanston, Illinois. In December 1948 and in April 1949, she had purchased two single-premium survivorship annuity contracts, one from Travelers' Insurance Company for a premium of $38,872.13, and one from John Hancock Mutual Life Insurance Company for a premium of $38,872.50. Under each, she was to receive an annuity of $125 per month during her lifetime and, upon her death, her daughter, Eloise Arms Forster (the petitioner), was to receive the annuity until her death, and at the death of the survivor of the two, all obligations of the company under these contracts would cease. The value of the survivorship annuity at date of decedent's death is not in issue.

In the estate tax return filed for the decedent's estate, the executor included in the value of her gross estate the sum of $19,963.50 on account of the survivorship annuity contract with Travelers' Insurance Company and $20,373 on account of the John Hancock Mutual Life Insurance Company contract. The executor thereafter filed gift tax returns for the decedent for 1948, including the Travelers' Insurance Company contract, and for 1949, including the John Hancock Mutual contract, and gift taxes thereon were paid.

A claim was filed for refund of the estate tax paid on account of inclusion of the value of these annuity contracts in the gross estate of the decedent. The Commissioner of Internal Revenue, rejecting the contention that the survivorship annuity contracts should be excluded, denied the claim for refund, but in assessing an additional estate tax liability the Commissioner allowed credit for gift taxes paid with respect to these survivorship contracts. This suit was brought by petitioner to recover the difference between the amount of estate tax paid on account of the inclusion of the value of the annuity contracts in the gross estate of the decedent and the amount credited against the estate tax as erroneous overpayments of gift taxes with respect to such contracts.

The District Court gave judgment for the Commissioner (Pet. 19) and the Court of Appeals unanimously affirmed (Pet. 20–24).

ARGUMENT

The purchase by the decedent of single premium survivorship annuity contracts providing a life an-

nuity to herself plus an annuity to the surviving annuitant is a transfer of property within the meaning of Section 811 (c) (1) (B) of the 1939 Code, as amended (*supra*, pp. 2–3), under which the decedent retained for her life the income therefrom. The courts have consistently so held. *Commissioner* v. *Clise*, 122 F. 2d 938 (C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate* v. *Commissioner*, 129 F. 2d 386 (C. A. 3d); *Grant* v. *Smyth*, 123 F. Supp. 771 (N. D. Calif.), affirmed *per curiam*, 226 F. 2d 407 (C. A. 9th); *United States Trust Co. of New York* v. *Higgins*, 56 F. Supp. 997 (S. D. N. Y.); *Stewart's Estate* v. *United States*, 116 F. Supp. 752 (D. Minn.). See also *Commissioner* v. *Wilder's Estate*, 118 F. 2d 281 (C. A. 5th), certiorari denied, 314 U. S. 634.

None of the authorities referred to as creating "conflicts between the various circuits" (Pet. 10) is to the contrary and the petitioner is incorrect in asserting (Pet. 13) that the law is "in a hopeless state of confusion." Petitioner relies upon the legislative evolution of Section 811 (c), culminating in the amendment of that section by Section 7 of the so-called Technical Changes Act of 1949 (Act of October 25, 1949, c. 720, 63 Stat. 891), and the apparent overlapping as between paragraphs (B) and (C) of Section 811 (c) (1) in some situations such as that here involved. But petitioner misconceives the significance of the evolution and the purpose of Section 7 of the Technical Changes Act.

The original predecessor of Section 811 (c), so far as material here, required the inclusion in the dece-

dent's gross estate only of transfers intended to take effect in possession or enjoyment at or after the decedent's death. In *May* v. *Heiner,* 281 U. S. 238, this Court held that a transfer in trust under which the grantor retained a life interest in the transferred property was not a transfer intended to take effect in possession or enjoyment at or after death within the language of the statute. As explained in *Hassett* v. *Welch,* 303 U. S. 303, the Government's attempts to secure a reversal of that holding resulted in its affirmance in 1931 in three other cases, and Congress thereupon amended the section prospectively by Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and later by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, to bring within the coverage of the statute those transfers under which decedents had retained a life interest in the property. But the retention of a life interest in transferred property was not deemed to make the transfer one intended to take effect in possession or enjoyment at or after death within the meaning of the statute until this Court's decision in January 1949 in *Commissioner* v. *Estate of Church,* 335 U. S. 632 (a case involving a pre-1931 transfer), overruling *May* v. *Heiner, supra.* On the same day, this Court decided *Spiegel* v. *Commissioner,* 335 U. S. 701, in which, in line with the trend of decisions of the Courts of Appeals, a somewhat remote possibility of reverter to the decedent (without a life interest) was held to require the inclusion of the value of the transferred property in the decedent's gross estate. Section 7 of the Technical Changes Act of 1949, *supra,* was then enacted to ameliorate the retro-

active effect of these two decisions. But Section 7 of the latter Act was not intended to relieve from inclusion in a decedent's gross estate those *post*-1931 transfers such as are here involved under which the decedent had retained a life interest. Instead, subsection (b) of Section 7 specifically stated that Section 811 (c) (1) (B) of the Code (relating to transfers with retention of a life interest) should not apply to those transfers made *prior to March 4, 1931* (when by joint resolution the provision relating to retention of a life interest was expressly incorporated in the statute).[2] The transfers here involved were made subsequent to 1931, with a retained life estate, and clearly are includible in the decedent's gross estate under Section 811 (c) (1) (B). Whether they are so includible is the only question actually presented.

Since the decision in *Commissioner* v. *Estate of Church, supra,* it seems clear that the value of joint and survivor annuities would be includible in gross

[2] As to transfers made after March 3, 1931, and prior to June 7, 1932, the exclusion applied only if the transferred property would not have been includible in the decedent's gross estate by reason of the amendatory language of the Joint Resolution of March 3, 1931. Section 7 (b) of the Technical Changes Act of 1949 provided that Section 811 (c) (1) (B) of the 1939 Code should not apply to such transfers "in the case of a decedent dying prior to January 1, 1950" (amended by Section 808 of the Revenue Act of 1951, c. 521, 65 Stat. 452, to read "January 1, 1951"), and these exclusion provisions were carried into Section 811 (c) (1) of the 1939 Code by Section 207 (a) of the Technical Changes Act of 1953, without any limitation based on date of death. A similar exclusion provision is contained in Section 2036 of the Internal Revenue Code of 1954.

estate under the broad language of earlier statutes taxing transfers intended to take effect in possession and enjoyment at or after death, but they are more directly includible under the specific provisions of Section 811 (c) (1) (B) of the 1939 Code relating to transfers under which the decedent has retained a life interest. While this results in some overlap between paragraphs (B) and (C) of Section 811 (c) (1), the two interests (transfers with a retained life interest and transfers with only a reversionary interest) receive different treatment under other provisions of that section. Paragraph (B) relates to transfers subject to a retained life interest, which were excluded from the gross estate by the decision in *May* v. *Heiner, supra* but were later included in the gross estate by statutory enactment. As to these, Section 811 (c) (1) specifically excludes such transfers made prior to the 1931 statutory inclusion.[3] But there is no basis for erecting a further exclusion merely because such transfers might be also excluded under paragraph (C) by reason of the absence of a reversionary interest. Paragraph (C), although embodying the broad language of earlier statutes, primarily is directed to transfers in which no interest was intentionally retained by the decedent, but which were includible under *Spiegel* v. *Commissioner, supra,* because of the possibility of reverter. As to such transfers, subsections (2) and (3) of Section 811 (c) prescribe limitations upon their includibility, depend-

[3] First, by Section 7 (b) of the Technical Changes Act of 1949 and later by inclusion of this limitation in Section 811 (c) (1) by Section 207 (a) of the Technical Changes Act of 1953.

ing upon whether the transfers were made before or after October 7, 1949.[4]

In the light of the above discussion, the cases on which petitioner relies (Pet. 10–14) are clearly distinguishable from the present case. In *Higgs' Estate* v. *Commissioner,* 184 F. 2d 427 (C. A. 3d), the decedent became entitled in 1934 to an annuity under an employee's pension contract with respect to which his employer had paid all of the premiums. In 1934, under an option granted therein, the decedent elected to receive a lesser annuity with a survivorship annuity payable to his wife. Decision in that case was based on the grounds that the decedent did not purchase the joint and survivorship annuity, his employer having paid the premiums, and that the only transfer, if any, was his exercise of the option to take a lesser annuity and provide a survivorship annuity. Since he retained no interest in the survivorship annuity, the court held that exercise of the option was not a transfer as contemplated by Section 811 (c) (1) (B), but taxable, if at all, under Section 811 (c) (1) (C) and therefore exempt under Section 811 (c) (2). See also *Libbey* v. *United States,* 147 F. Supp. 383 (N. D. Calif.).

[4] Subsections (2) and (3) of Section 811 (c) apply only to transfers includible under paragraph (C), while the limitations of Section 7 (b) of the Technical Changes Act of 1949 later added to the Code by Section 27 (a) of the Technical Changes Act of 1953, apply only to transfers includible under paragraph (B). Both petitioner's statement of the question (Pet. 2) and discussion (Pet. 6–14) indicate some confusion as to the applicability of these provisions.

In *Pruyn's Estate* v. *Commissioner*, 184 F. 2d 971 (C. A. 2d), the decedent purchased joint and survivorship annuities *prior to 1931*. The court specifically recognized that the decedent had thereby "contracted for a life estate on her own behalf" (p. 972), but of course the transfer could not be included in the decedent's gross estate because Section 7 of the Technical Changes Act of 1949, *supra*, had been enacted in the meantime, specifically making Section 811 (c) (1) (B) inapplicable to transfers prior to 1931. The fact that the court's *per curiam* opinion indicates that dismissal of the appeal was based on Section 811 (c) (2), under which it was also excluded, does not result in a conflict with the present case.

CONCLUSION

The decision of the Court of Appeals is correct, is not in conflict with any other decision, and presents no important question requiring review by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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